

PLEADINGS,

In some remarkable Cases,

Before the supreme Courts of

SCOTLAND,

Since the Year, 1661.

To which, the Decisions are sub-
joyn'd.

By S^r George Mackenzie

Cicero in Brut.

*Nulla res tantum ad bene dicendum pro-
dest, quantum scriptio.*

W E D I N B U R G H,

Printed by the Heirs and Successors of An-
derson, Printer to the Queens Most
Excellent Majesty, Anno DOM. 1704.

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THE
AUTHORS REFLECTIONS
upon these
PLEADINGS.

Few men can expect praise by Writing in this Age, wherein every man almost doth think himself rob'd of that praise which is given to others, and wherein he is thought to want wit, who will allow others to have any. Former Ages railed against such as wrote ill, but ours against such as write well; they were sometimes so unjust, as not to reward merit; but we are so malicious as to persecute it: Thus we can neither want new Books, nor deserve them; And it hath been well observed, that it would seem now that none but mad men write or censure.

This I say, not to regrave my own fate which hath been kind to my Writings beyond my merit and expectation; and though it had not, yet I am secure, by want of that merit which can raise envy: But I say it to regrave, that this should have stopt so many ingenious and learned men in our Profession, from illuminating our Law, and from informing our Countrey-men. The Laws of other Nations are oppress'd, but ours is starv'd. This made me adventure to write these

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these few sheets, and I wish that censure which is so much feared by others, might blunt all its edge upon me; and that I might, like that noble Roman, by leaping into this gulf, secure my Countrey against this Plague.

This way of writing hath been very happy amongst Strangers, and was not minded hitherto by us, and what way of writing is preferable to that, which hath been successfull, and yet is new? But my design in choosing this way of writing, was to inform strangers as to our way of pleading in Scotland, to form to my self a Stile, and to give me an easiness in pleading; for since that is my daily Employment, it should be my greatest care, *Nihil tantum ad bene dicendum prodest, quantum scriptio*, says Cicero, the greatest Master of that Art. I had, by pleading whilst I was yet very young, wrapt my self into errors which could not be reformed in the croud and noise of businesse, and therefore I resolved to employ some serious and solitary hours for my own recovery; and that I might oblige my self to the greater exactness, I resolved to print what I wrote, hoping, that thus the fear of censure would overawe my laziness: By printing them, I likewise design to know my enemies, and my faults, such as censure maliciously will inform me of the one, and such as censure justly will instruct me in the other.

I designed at first, to have printed many more, but I thereafter considered, that if

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these

these pleased not, they were too many, and if they did please, it was easie to add: and I resolve to correct in the last, what shall be found to be justly censurable in the first.

In three of those pleadings, (*viz* 2, 3, 7.) I have mingled with my own Arguments, the Arguments of such as pleaded with me. In the rest, I have used only my own; those three I wrote to be Patterns, because they were not particularly mine; those which are particularly my own, I wrote for my own divertisement and if they bear any proportion to their fellows they may not only satisfy the World to which they go, but (which is it may be harder) the Author from whom they came.

I have been oft asked two contrary questions; one was, How I diverted my self during all our six vacant Moneths? and by others, How my Employment gave me leisure to write? To answer both at once, I conceive that a man in two afternoons of each vacant week, may write twice more then ever I sent to the Presse; and he must be very busie, who hath not these to spare.

When I was too young, to write in my own Profession, my love to my Countrey tempted me to write *Moral Philosophy*, and to adventure on a *Play* and *Poem*; but now that I find, that our Countrey-men could be happy enough in these, if their inclinations were not lesse then their abilities, I have abandoned

done those Employments, and the spring of my Age being past, it is fit those Blossomes should ripen into fruit. I promised formerly never to appear in print, save in my own Employment; to which promise I have, these five years last by past, been very faithful; and this being my first Essay in it, some allowance is due to a beginner.

I must confesse, that many in this Kingdom could have exceeded my poor endeavours, but it were unreasonable for any man, to refuse to fight for his Countrey, because another could fight better. And I rather conclude, that others need not be discouraged, though I meet with no applause; whereas, if any be allowed me, their greater Parts may expect a greater measure of fame; and as I have been very kind to all my Countrey mens Productions, so I shall be extreamly pleased to see my self out-done in my Countreys service. I designed to let Strangers know how we plead in *Scotland*, and therefore it was not fit, that I should have used here the English Language. I love to speak as I think, and to write as I speak.

No man should be vain, because he can injure the merit of a Book; for the meanest Rogue may burn a City, or kill a Hero; whereas he could never have built the one, nor equalled the other:

And I confesse, that an ordinary Wit may discover faults in a better Author than I pretend to be: For the Writer being intent upon

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on all, cannot lay out all that industry upon every line which a malicious Critick can; who (like the Wasp) fastens still upon the fore : But a greater Wit than they said,

Uoi plurima nitent in carmine, non ego. Paucis

Offend r maculis—

Malice likewise and observation can easilier fix upon a printed Pleading, than upon what flies away from a current Speaker: And a Discourse, animated by the voice and action of a graceful and sprightly Orator, will supply very much of that force and beauty which a cold and indifferent Reader will require in what comes from the Press.

I am not concerned in the reception of this Book, my cares end with the printing : and thoughts in an Innocent breast, are as secure as men are, when storms grumble and roar about the strong Castle where they are lodged. Few ever displeased, and none ever pleased all. Such as censure too severely those sheets, are either of my own Profession, or not ; those who are not, may fear to be thought ignorant ; those who are, to be thought emulous, But having now confined all my recreations to my own Employment, if I cannot please others, I will at least improve my self. But it would abate very much the passion of Authors and Criticks, of Advocats and Clients, if all would seriously weigh my beloved Verse,

*Hi motus animorum, atque hæc certamina tanta,
Pulvis enigmæ jactu compressa quiescent.*

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What Eloquence is fit for the Bar?

AN ESSAY.

Eloquence is that Art, by which the Orator at once convinces, and pleases his Hearers; and by which he gains Fame, and Obedience. Monarchs govern our Estates, but the Orator governs our Wills and Inclinations; the Soldier may conquer our Lands, but the Orator our Reason; and whilst these owe their Empire to multitudes of men, and Accidents, he doth alone share in the glory of his Conquest. Amongst all such who stand Rivals for his great honour, the Advocate seems to have the fairest Pretensions; for a Courtier may by Eloquence charm a Lady, he may Raily, and say nothing with a *Bon grace*: a Preacher may in his Retirement, Form a Discourse, which after much Premeditation, meets with no Opposition; but the Advocate must upon Subjects infinitely various, make present Replies to what he did not expect. We come to Church convinc'd of every thing our Preacher is to say, we are the Converts of his Theme, and not of his Discourse: but at the Barr, Justice do's oftentimes Side so equally, that a thousand times the Hearers do confess themselves still convinc'd by the last Speaker, What can the World bestow above what it allows the Advocate, as the Reward of his noble pains? What is so desirable, as to be a Sanctuary to such as are afflicted, to pull the Innocent from the Claws of his Accuser,

to gain bread for the Hungry, and to bring the Guilty to a Scaffold? What is so noble, as to be depended upon by such as are in Prosperity, (for Client and Depender, are the same in all Languages) to be complemented by such as are Beautiful and are admir'd by such as are Learned? And if he design to flatter his Vanity, would it not charm him to see a crouded Audience stand in a profound Silence, with Countenances which do mark Longing and Reverence, to see every man look with amazement upon his Neighbour, and all upon the Speaker; whilst he makes his learned Judges, bow under the weight of his well exprest Arguments and when the Discourse is ended, to have all who see him Salute him with Respect as he passes by, and the City choose him for the Subject of their kind Discourses?

Some Divines and Philosophers, have ofttime prov'd so unjust to the Law it self, as to think it too dull and flat a Science to afford such subtile Reflections, as could be the Foundation of an accurate Debate: To whom I design modestly to return no other Answer, then that Men cannot judge well what they do not thoroughly understand. These common eyes discover no difference betwixt the Stars, though to judicious and learned Persons, they appear in their distinct Classes: I wish they would consider, how much the Actions of men differ, how many Circumstances attend every one of these, and how they are varied by these Circumstances; if 24 Letters can by their several conjunctions, make up such a swarm of words, certainly thousands of Statutes, Customs, and Cases, must afford much room for new and subtile Conclusions; especially

especially since these have been subtiliz'd and cultivat for many ages by the finest Spirits of the World, who have been drawn to prefer this to all other Employments, and to refine themselves to all imaginable Height in it, by the joynt hopes of Glory, Applause, Preferment, Money and Emulation :

——— *Stimulos dedit amula virtus.*

I doubt not but there are many, who will think that Eloquence is not allowable at the Barr, since those who are to be convinced there, are Old and Reverend Judges, whose severe Judgements are not to be moved by a pleasing Discourse, but by Solid Reason, Old Age being little taken with those Flourishes, which it cannot practise: and that though where Passions are to be excited, as they are by the Pulpit, and Theater, or where Statsemen endeavour to reclaim a mutinous Multitude, There, Eloquence is not only allowable, but necessary (Eloquence being the true Key of the Passions) yet, since no Passions are allowed in judging, and the Object of that excellent Science, being Truth, and not Humor, Eloquence should not be allowed in Discourses there: And I imagine it will be Objected to me, that at the first Institution of our Senate, It was appointed by an Act of Sederunt, That all Argunning (which term was us'd in that Age for Arguing) should be *Sylogisticè*, and not *Rhetoricè*.

To which my Answer is, that Eloquence do's not only consist in Trops, Figures, and such extrinsick Ornaments, whereby our Fancy is more gratified, then our Judgment, and our Discourse is rather painted then strengthened; but when I

mean that an Advocat should be Eloquent, I design thereby, that he should know how to enliven his Discourse with Expressions suitable to the Subject he Treats ; that he should chose Terms that are significant, and which seem full of the thing which they are to express, and so lodge his Reasons handsomly ; though when his Subject looses him from the strict Terms of a Statute, or Authority, and that he is to debate upon probable Theams, to enquire into publick Utility, or to enforce or answer presumptive Arguments, he may use a more florid and elegant Stile : his great Design is to conciliate favour to his Clients Cause ; and sure, *ceteris paribus*, even the learn'dst and most severe Judges, love to be handsomly Inform'd, and he must be very just, who is not somewhat bribed by Charming Expressions. But that the greatest part of Judges are taken with that Bait, is most undeniable ; and as in Marriages we find, that even those who desire rich Portions, are yet pleas'd to have a beautiful Mistress, and the severest man alive will be content to abate somewhat of the Portion to gratifie his Fancy ; So, I am sure that a *Papinian* or *Ulpian*, would, when the Scales seem to stand even, encline to that side upon which Eloquence stands. Eloquence raises the Attention of a Judge, and makes him follow the Speaker closely ; so that nothing which he says in favour of his Client passeth unregarded ; whereas another may say what is very reasonable, and which if it were notic'd, might weigh much ; and yet the Judge who is not allured to hear Attentively, may easily miss it.

I may likewise add, that Eloquence thaws (like the

the Sun) the Speaker himself, who when he is warm and pleas'd, will thereby have his Invention stirr'd up, and his Memory and all his Faculties opened; by which many excellent and apposite Reasons may be suggested to him; as we see the Earth (when warm'd) casts up many new and profitable Fruits and Herbs, as well as Flowers; whereas, we may daily observe, that a stiff and cold Pleader do's omit oftentimes, even what he knows. By the same Eloquence also, the Hearers being warm'd and thaw'd, have their Judgements thereby open'd, and do receive more easily Impressions of what is spoke; and I conceive Eloquence the fitter for Advocats, that others think it should be banish'd, as that which may Bryb and Corrupt Judges: and methinks it should be pardon'd some little dangerousness that way, since it pleases so much another; nor can I think but that Providence has ordain'd it for the Barr, to soften, and sweeten Humours, which would else by constant sticking at meer Law, become too rigid and severe; and to divert and ease the Spirits both of Judges, and Advocats, which are too much upon the Rack, and bended for the service of their Country.

As to our Act of *Sederunt*, which appointed, that all Pleading should be *Sylogisticæ*, I need not reflect upon the Ignorance of those times, which was very excuseable amongst us, since it did at that time blind even *Italy* and *France*, who do now smile with pity upon the Customs and Productions of their Countrymen in that Age: but I conceive, that our Session having been at first Constituted of an equal number of Church-men and La-

icks, and the President being an Ecclesiastick, these Church-men having the advantage of Learning and Authority, did Form that Act of *Sederunt* according to their own Breeding, by which they were tyed in their Theology-schools, to Debate by Syllogisms; but After-ages having found this upon Experience, to be very unfit and pedantick, they did not only suffer that Act to run in desuetude, but allowed of this Auguster and more Splendid manner of Debating, which is now used. And therefore I conclude, that not only is that way not warranted by the Authority of that Act, but that it hath the less Preference because of That Act; For, if that Act had not been made, we might have been induc'd to believe that such a Way might take; but now since Experience hath Reform'd us from it, and since even the Authority of a Statute could not maintain it, we must think it was not fit nor suitable, as indeed it is not, if we consider these few Remarks.

All Sciences have an expression which is suitable to them; the Mathematicks require Demonstration, and discover themselves to the Eye; Medicine and Natural Philosophy, require Experiments; Logick, Metaphysick (and alas now Theology) must wrestle by Syllogisms; but the Law argues by a Discourse, free and unconfined, like those who debate from its Principles. It is the nature of a Syllogism, to have the subsumption in the second Proposition; but in Pleading, the Matter of Fact must come first, for it stands in the state of the Case, and therefore though it be proper for Lybells (which are but a Syllogism) yet it suits not with a Defence: and it were very ridiculous, and impossible

Possible, to wrap up a long Story, many Circumstances, Presumptions and Probabilities in a Syllogism; and oftimes there are many Defences propounded and joyned together. The most ordinar and most allow'd way of Arguing in Law, is by Similies, Instances and Parallels, and it is improper to drive those into Syllogisms: but he will best confute this way of Arguing by Syllogisms, who will sit down and plead any of the Causes I have set down in a syllogistick way, which if any man do, I shall renounce Pleading, except he take syllogistick debating in a very large sense; As for Instance, in *Kennedie's Case*, the Pursuer behov'd to say, *He who is guilty of forging Writs, should be hang'd; but so it is, Kennedy hath done so; ergo, The Defender behoved to deny the Minor, and then the Pursuer behov'd to say, he who is burden'd with such and such Presumptions, is guilty of Falshood; but Kennedy is guilty of these; and there he behov'd to insist upon all the indirect Articles or Presumptions: but how should the Defender answer all these by a *distinguo*? or if this way were introduced, how ttle would this shorten Debates? and are any Creatures alive so litigious as some Divines, and Philosophers, who debate only by Syllogisms? and so little do Syllogisms contribute to clear a Debate, that both in their schools, and Books, such as use Syllogismes must leave that way, and enlarge themselves by Discourses, when the Debate grows warm, and intricate.*

Every man in Pleading, gratifies his own Genius, and some of all kind find equal Success, and Applause; but it has been oft Debated, whether Pointed and short Pleading, wherein the Speaker

singles out a Point, and presses it, or full and opulent Pleading, wherein the Speaker omits nothing which may prove advantageous, be preferable. each side has its Examples, and Patrons.

The full and copious way pleases me; for I not only find that to have been used by *Demosthenes* and *Cicero*, but *Plinius* assures us, that it was used by *Cesar* and *Pompey*. At first no man was stinted amongst the Romans in his Pleading, and when they were confined by *Pompey*, *qui primus fræna imposuit Eloquentiæ*, the Pursuer was allowed two hours, and the Defender three; but this being found thereafter too narrow, *Calpurnius* did allow the Pursuer six hours, and the Defender nine: Nor can a Pleader be interrupted in *France*, (where Pleading is in its greatest Perfection) though he speak three full days; and if it be a Fault, it is *peccatum felicitis ingenii*, the Error of great Wits, whereas short Pleading, is common to such as pretend to be great Spirits, and to such really as are meer Dunces. Such as use to say much can contract their Discourses; but few who are used to say little, could say much, though they were willing; and Copious Pleading is called ordinarily a Fault, by such as have not the Wit to commit that Crime themselves. We see that in Nature, the largest Bodies are ordinarily strongest, the largest Fruits most desired, and many stroaks do best drive in the Wedge. Nature has produc'd many things for meer Ornaments; and God has in his Scriptures, us'd Eloquence and Rhetorick on many occasions. But there are two Arguments which have determined me to this Choice; the first is, that a short Pleader may leave things unclear, and so wrong
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his Client ; whereas a full Pleader can only burden too much his Hearers, and so wrong only himself. A narrow and starved Discourse, is like those slender and small costed Bodies, which allow not sufficient room for the Noble Parts to exercise their Functions, *Non enim amputata oratio, & abscissa, Sed lata, magnifica excelsa, tonat, fulgurat & omnia evertit.* The next is, that even where there is but one Judge, it is uncertain which of all the Arguments will convince him ; but there are many, as with us, it is very well known to such as discourse in private with them, upon what has been pleaded, that some fix upon one Argument, some upon another : the best Lawyers differ oft in Opinion upon debatable Points, and it is great vanity for any Pleader to think, that he can certainly know what will take, and what not ; this was really not an Apology for my Error, but the motive of my Choice, and I find it to have been formerly used by *Plinius* the younger, (the greatest Pleader of his Age, and whose Epistles do of all other books best inform us how to plead) this Great man in his 20 Epistle tells us, that *Regulus* said to him, *Tu omnia quæ in causa putas exequenda, ego jugulum statim video, hunc premo respondi. posse fieri, ut genu esset, aut tibia, ubi ille jugulum putaret, at ego qui jugulum perspicere non possum omnia pertento.* But I will not with him add, *Neque enim minus imperspicua, incerta fallaciaque sunt judicum ingenia ; Quam tempestatum, terrarumq; adjiciam quod me docuit usus, Magister Egregius, aliud alius movet, varia sunt hominum Judicia, varix voluntates, inde qui eandem causam simul audierunt, interdum idem, sæpe diversum, sed ex diversis animi motibus sentiunt,* Our Colledge of Justice is but one Body,

in which the Senators are the Judicative Faculty, and the Advocats the Inventive ; and as the Judgment is too rash, when it concludes before the Invention has represented to it all that can be said, *pro*, and *con* ; even so Judges should not Decide, till the Advocat (who is animated by Conscience, Applause, and Custome to find out, all can be said) do first lay open all the Reasons, and inconveniences which he has in his Retirements prepar'd : from which also I conclude, that seeing the Advocats are in place of the Invention, that those Advocats who have the fertilest Invention, are most fitted for that excellent Employment.

When I prefer copious Pleading, I design not to commend such as are full, but of Tautologies, and Repetitions, who have more Periods, then Arguments ; and who, Providing they find many words, care not much how to choose them. I love a Discourse which is Beautiful, but not Painted ; Rich, but not Luxurious ; Harmonious, but not Canting. I am not for many Replies, Duplies, and Triplies, but for one, or two strong, full and clear Discourses, and to lengthen those, by streaching out those unnecessary Plyes into one just measure. Nor do I love long Pleading in the Outer-house, where new Decisions are not to be made, but where the Old should be follow'd ; and where the multitude of Attenders do require a speedy dispatch, and in the Inner-house it is only to be practised where the Cause is New, and Fertile, and when the Judges desire a full Information ; for it is most unfit to vex an unwilling Judge, who will think that he loves not to hear ; meer affectation, and vanity : but Envy must not want its Objections, and where

it finds not a Fault, it makes one out of the next Virtue; when a man pleads fully, it terms that Luxuriency, and when he pleads shortly, it will have that pass for Ignorance, or Laziness: and so Inconsistent are Backbiters, not only with the Truth, but in what themselves invent, that I have heard one and the same Pleader, blam'd for a too luxurient Pleader by some, and for a lazie Pleader by others, because in the Inner-house he used the full allowance, and in the Utter-house he thought it impertinent to make Speeches, where a short Defence is only necessary; for either the Point there is clear, as ordinarily it is, and then it is absurd to enforce a Principle; or it is dubious, and then he gets the Lords answer, and may be full in his Information; and why should pains be taken to vex a Lord with Debate, who is not to Decide?

Far be it from me to prescribe Magisterially, a Form of Pleading, to others: but I love to tell freely my own Opinion, and if others did so too, we should shortly, from comparing Notes, come to know what Method were most allowable.

In pleading amongst the Ancients, and yet amongst the *French*, there was still a Preface, and Epilogue. Amongst them, he who spoke first, endeavoured to establish his own Opinion, and to anticipate what he thought might be urg'd by his Adversaries; but with us the Pursuer relates only the Cause, which he is only allow'd to adorn with a pertinent Representation of such Circumstances, as may best, either astruct the Justice of his own Pursute, or obviate unnecessary Objections in his Opponent, but without mentioning any thing *pro*, or *con*, in *jure*. And yet I have heard the Case so prudently

prudently stated, as that thereby the Defender was precluded from many Defences he design'd to Propone; for amongst able Pleaders, most of what is debated, arises from a Difference rather in Fact, then Law; and it is a great Affront for one to plead in Law, a long Discourse, which the other will grant to be all true, when the Discourse is ended: And yet I have heard some concede all was said, and seem to difference the present Case from the Case pleaded, when indeed there was none, but when this was done meerly to evite a Discourse which could not be answered. After the Pursuer has stated his Pursute, and enlarg'd himself upon all the favourable Circumstances which we call the Merits of the Cause, the Defender proposes his Defence, but urges it little, till he know it be contraverted; but if the relevancy of the Defence be contraverted by the Replyer in a full Discourse, then the Duplyer makes a full Answer, and ordinarily these terminat the Debate, and after that the Discourses become too thin and subtil, and the Judges weary, albeit some Causes because of their intricacy, or of new emergements, require moe Returns.

In these Replies, or Duplyes, our Custom allows a short Preface upon solemn Occasions, in which the Rule seems to be, that these Prefaces should not be too general, and such as are applicable to any Debate; as when the speaker excuses his own weakness, or recommends Justice to the Judges, or such common places; but it should run upon some general principle, which though it be not a concluding Argument, yet tends much to clear that which is the Subject of the Debate: as
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in the French Pleading, I have Translated, the Pleader being to enforce that a civil Death purifies the Condition, *Si sine liberis decesserit*, he begins with a Preface, which shews, that the Law has a great Empire over Nature, and plys its Events to its civil Designs; whereas I being to plead the contrare, I do insist to clear in general, that Matters of Fact, escape the Regulation of Law, and that Law is ty'd to observe Nature.

The Discourse it self do's consist of these Arguments, whereby the Defender maintains his Defence; or of these Answers, by which the Pursuer elids those Arguments; and to range them appositely into their own places (so that such Arguments as have contingency, may be set together) is a mark of a clear, and distinct Wit: and when Arguments are so rang'd, each of them adds strength to another, and they look like men well Martiall'd into distinct Troops; whereas Arguments stragling out of that place where they ought to have been placed, seem unpleasant, and irregular, and will hardly be expected where they are; for Instance, in pleading against the Viscount of Stormont, all the Arguments which can be press'd, are either such as endeavour to prove, that the Clause of Stormont's Infestment, is contrary to the nature of *Dominium* or Commerce; and after that the Pleader had past first *Dominium*, and then Commerce, to return to those Arguments, which arise from the nature of *Dominium*, were Irregular; for that were to return to show what he had forgot. And from this I conclude in Reason, that all Arguments founded upon that same general Principle, should be pleaded together, and in the ordering of these

these Generals, I would choose to begin with those which clear best either Matter of Fact, or which tend most to illuminat the Subject of the Discourse; and thus the Controversie in *Stormont's* Case, being, whether the Proprietor of Tailzied Lands, may alienat these Lands, if he be prohibit to alienat by the first Disponer, or at least if they may be Comprys'd from him; the first Classe of Arguments to be urg'd, should be these which tend to prove, that this Prohibition is inconsistent with the nature of *Dominium*, and Propriety, for these clear best the nature of Propriety, which is the chief Subject of the Debate.

He who answers, uses with us, to repeat the Arguments which he is to answer all with one Breath, before he begin to make distinct Answers to them; and this proceeds as I conceive, from the Aristotelick way of Arguing in the Schools, wherein he who maintains the Theses propos'd, must repeat the Argument, before he answer it: this Method I love not, for it consumes unnecessarily much time, and sure it wearies Judges to hear the same Argument twice, yea thrice, repeated; for first, the Enforcer do's repeat them, then the Answerer do's repeat them, both generally at the entry of his Discourse; and thereafter he must repeat each Argument when he is to make a special Answer; and I should think it much more natural to repeat and answer each Argument a part, ordinarily the Answerer follows in his Answers, the Method of the Proposer; yet sometimes he chooses rather to Classe the Arguments as he pleases, and to answer accordingly. If the Defender design to answer the Arguments brought against his Defence, and to add
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new ones to astruct the reasonableness of his Pursuit, he uses first to use his own Arguments, and then to answer what is alleadg'd for the Defender.

Whether the strongest, or weakest Arguments or Answers should be first insisted on, was much debated amongst ancient Orators; some thought the weakest should be first urg'd, because the Judges were then freshest, and might possibly by weariness slight what was delay'd: others thought fit to leave with the Judges the strongest Arguments, that they might be fresh with them when they were to Decide: this I think is Arbitrary, and they are but weak Judges, who do not weigh all equally; but I think it adviseable for a young Pleader, to urge the strongest Arguments first, that he may thereby conciliate favour to himself, and raise the Attention of his Judges, and in all Cases where the Cause seems unfavourable, the strongest Arguments are first to be used, for the same reason, and there seems little reason to leave the strongest Arguments last, if the Cause be not presently to be decided; but where many Answers are to be made to one Argument, the weakest is ordinarily first made, and as it were overlye, but the strongest is reserved last, because it is most to be insisted upon: and I think it most natural to urge the weakest Arguments first, because our Discourse should like our selves, and like our Studies, grow from strength to strength, and from less to more, but sometimes one Argument grows from another, and then there is no place to doubt, and always the most Mysterious Argument is to be left last, because it is to be presumed, that then the Cause is best understood, and Mysterious Arguments come

come to be most in season, when Judges have fully master'd the Cause.

The Epilogue with us is ordinarily, *In respect whereof the Defence ought to be admitted, or repell'd, &c.* But in some solemn Cases, the Pleader may recapitulat shortly his strongest Arguments, or may urge the Favour and Merits of the Cause; and I should love to preis this Merit rather here then in the Preface; for Favour is but an accessory of Justice, and the Consequent should not precede its Cause.

Action, was of old one of the chief Ornaments of Speech, under which was comprehended, Gesture, and Voice, all which were accommodated to the Orators Design; when they spoke to Multitudes of ignorant people, to whom, Tears or Ejaculations pleaded more, then Reason did; for that they understood better, as more obvious to that sense by which they were govern'd: but now the World is become too wise to be taken by the eyes, albeit I confess these add Grace, though not Force.

With us, Action is possibly too violent, which I ascribe both to the violent temper of our Nation, *preservidum Scotorum ingenium*, and to the way of our Debate, for Fire sparkles ordinarily from the collision of two Bodies, one against another, some debate for Interest only, some for Honour, but Advocats for both; yet hardly can he raise Passion in others, who shows it not himself; and all men presume, that he who is very serious, and earnest to convince others, is the convert of his own Argument. I confess, that Passion do's disorder very much the kindled speaker, and that he can hardly clear.

clear well his Discourse who is himself perturb'd, and we know the design of an angry man no more, then we can see clearly the bottom of troubled waters : and therefore it were very adviseable, that hot and cholerick Spirits, should calm themselves before they adventure to enter upon a serious Debate ; but such as are bashful are the better to be warm'd, and to loose prudently, a little of their indiscreet Modesty ; Melancholick Persons likewise who are ready to loose themselves in their wandering Thoughts, need to be a little fretted, for thereby they become intent, and finding themselves somewhat piqu'd, they are gather'd into their Subject. He who fears to be interrupted, will ordinarily stammer, for he will be more busy in thinking upon the being interrupted, then upon what he is to say ; and there, Passion do's well also, seeing then he considers nothing but what he is speaking.

Railing, is of all other qualities, the worst in a Pleader, for it makes men judge that his Cause needs it, when he rails against his adverse Client, and that he finds himself worsted, when he rails against his adverse Advocat : but sometimes he is obliged to found upon Matters of Fact, which though they have much of Reflection in them, yet are necessar Truths ; and sometime the Law by which he pleads, obliges him to Terms, which may seem rude to Strangers, and in both these Cases, not to be severe, were Prevarication ; though I have known Advocats very innocently condemn'd for calling the late times Rebellion, and such as were forfeited Traitors, though in that they spoke their Art, and were not obliged to speak their

their Thoughts : and there are few Clients, who when they loose the Cause, do not discharge a great part of their fury, upon these Advocats by whom they conceiv'd themselves overthrown.

Too subtle speaking convinces few, because few understand it, and it is applauded by few, because few can reach to the practice of it ; and in young men it may be interpret to be but affectation, or notionalness, though in such as have by long practice establisht their own Reputation, it gains Glory. Many Citations are also to be avoided by all in pleading (though they are necessar in writing) especially in young men, for in these they are thought but common place-wit ; and yet young men do most use that way, because they think thereby to supply their own want of Authority ; and because they know not many parallel Cases, and are not yet so intimatly acquaint with their Subject, as to draw Arguments out of its retired Intrails. Many Parenthesis are to be avoided, for they interrupt the Threed of the Discourse, and make it Knotty, and Mysterious, though these Weeds grow ordinarily in the richest Soil ; and are the Effects of a luxuriant Invention. Frequent repetition of the ordinar Compellations, such as *my Lord Chancellor*, or *my Lord President*, are to be likewise shunn'd.

Before I propose what Phrase, or Stile is fit for a Pleader, it is fit to tell that the two usual Stiles known by distinct Names, are the Laconick or short sententious Stile, and the Asiatick, or profuse and copious Stile ; the first was used by the old Roman Legislators, as is clear by reading the Digests ; but when the Empire was transferr'd to Constantinople in Asia, the Empire changed its Stile with

with its Seat; and we find that *Profluvium Asiaticum* in the *Codex*, and Novels. Yet all the Grecian and Roman Pleaders, even in their purity, us'd a full copious Stile, as is clear by *Demosthenes*, *Cicero*, and others, and though Legislators or Judges should use the Laconick, yea the other must still reign at the Barr. A Barrister likewise should rather study not to want Words, then to stick at the choosing fine ones; and the generality of Hearers, are more displeased at a Gap, or Breach in a Discourse, then can be recompens'd by a multitude of these fine words or Sentences which occasioned these Gaps, whilst the Speaker waited for these delicate Words which he found after that Stop; and as I have known many admir'd for a fluent speaking of Pitiful Stuff, so I have known others lose the Reputation of Orators, by studying in their greener years too much fineness; and I would advise my friends who begin to speak, first to study Fluency, and when they are arriv'd at a consistency there, they may easily refine the large Stock they have laid together.

Many who are not friends to the Barr, inveigh much at the canting Terms which they say is us'd there; but these do not consider, that every Science has its particular Terms, and it were Pedantry to substitute others in their place; and as a man looks ridiculously in a womans Habit, or a woman when Attir'd like a man: a Souldier under a Gown, or a Church-man in Buff; So it is as ridiculous to hear a Member of Parliament, or a Counsellor, speak of Affairs in Terms of hunting, as it is for a Lawyer to speak in his Terms of other things; and I laugh as much to hear Gentlemen speak.

ſpeak in their canting Terms of Hunting, Hauking, Dauncing, as they can do to hear me ſpeak in the Idiom of my Trade : and to ſpeak like a Gentleman at the Barr, is to ſpeak like a Pedant ; Pedantry being nothing, but a tranſplanting of Terms from what they were fit for, to that to which they are moſt unfit, and I love equally ill, to hear Civil Law ſpoke to in the Terms of a Stile-Book, or accidental Latin, (as is moſt ordinar) as to hear the genuine words of our Municipal Law, forc'd to expreſs the Phraſes of the Civil Law and Doctors.

It may ſeem a Paradox to others, but to me it appears undeniable, that the Scottiſh Idiom of the Brittiſh Tongue, is more fit for pleading, then either the Engliſh Idiom, or the French Tongue ; for certainly a Pleader muſt uſe a brisk, ſmart, and quick way of ſpeaking, whereas the Engliſh who are a grave Nation, uſe a too ſlow and grave Pronunciation, and the French a too ſoft and effeminate one. And therefore, I think the Engliſh is fit for Harranguing, the French for Complementing, but the Scots for Pleading. Our Pronunciation, is like our ſelves, Fiery, Abrupt, Sprightly and Bold ; Their greateſt Wits being employ'd at Court, have indeed enricht very much their Language as to Converſation, but all Ours bending themſelves to ſtudy the Law, the chief Science in Repute with us, hath much ſmooth'd our Language, as to Pleading : and when I compare our Law with the Law of *England*, I perceive that our Law favours more Pleading then their does ; for their Statutes and Deciſions are ſo Full and Authoritative, That, ſcarce any Caſe admits Pleading, but (like a *Hare* kill'd in the Seat) it is immediatly ſurpriz'd

surpriz'd by a Decision, or Statute. Nor can I enough admire, why some of the wanton English, undervalue so much our Idiom, since that of our Gentry differs little from theirs, nor do our Commons speak so rudely, as these of *York-shire* : as to the words wherein the Difference lyes, ours are for the most part, old French words, borrowed during the old League betwixt our Nations, as *Cannel*, for *Cinnamon* ; and *Servit*, for *Napkin* ; and a thousand of the like stamp ; and if the French Tongue be at least equal to the *English*, I see not why ours should be worse then it. Sometimes also our fiery Temper has made us for haste, express several words into one, as *stour*, for *dust in motion* ; *sturdy*, for *an extraordinary giddiness*, &c. But generally, words significant *ex instituto*, and therefore, one word is hardly better then another ; their Language is invented by Courtiers, and may be softer, but ours by learn'd men, and men of Business, and so must be more massie and significant : and for our Pronunciation, beside what I said formerly of its being more fitted to the Complexion of our people, then the English Accent is ; I cannot but remember them, that the *Scots* are thought the Nation under Heaven, who do with most ease learn to pronounce best, the French, Spanish, and other Forreign Languages ; and all Nations acknowledge that they speak the Latine with the most Intelligible Accent, for which no other Reason can be given, but that our Accent is Natural, and hath nothing, at least little in it that is Peculiar. I say not this to asperse the *English*, they are a Nation I honour, but to reprove the Peccancy and Malice of some amongst them, who think

think they do their Country good service, when they Reproach ours.

— *Nec sua dona quisque recuset.*

I know that *Eloquence* is thought to have declin'd from *Cicero's* time, and it hath so indeed, if with Pedants, we make *Cicero* the Standart, for nothing can be straighter then its Square; but I conceive that the World do's like particular men, grow Wiser and Learn'der, as it grows old; but of all things *Eloquence* should improve most, because of all things, it ripens most by Practice; Experience discovers daily more and more, of the humour of such whom we are to convince; and the better we know them, we can convince them the easier. By Experience also we learn to know, what Forms, and Sounds please most; and every Pleader and Orator adds some new Inventions to that of the last Age; and if one being added to twenty make twenty a greater number, then the *Eloquence* of this Age, being added to that of the Former, must make this Age more Eloquent then the last. But I know such as envy the Orators of the present Age, do still endeavour to mortifie them, by admiring; such as are dead, who in their time met with the same measure; Death also removes men from being our Rivals, and so from being envy'd by us; yet we should remember, that even *Cicero*, and *Demosthenes* did complain of the same in their Age, though they far exceeded their Predecessors.

Some may think that the *Eloquence* of Rome, and others, behov'd to be higher then ours, because the Multitude were in these Common-Wealths absolutely govern'd by it, and the greatness of their Reward for *Eloquence*, exceeding ours, their *Elo-*

quence

quence behov'd to do so too. But I am formally contrary, for since our Judges are wiser, and more learn'd than the Commons, there must go more Art to Convictions now, than was requisite then, and though we have not Kings, nor Common-Wealths to defend, as those oftimes had, who pleaded in the Roman Senate; yet we may show as much Eloquence upon lesser Occasions, as one may cut finer Figures upon Steel, then upon Gold; it is the intricacy of the Case, and not the greatness of the Pryze, which makes the value of the Pleading, and generous Spirits are more animated by difficulty, then Gain. We have also more Laws, Parallels, and Citations to beautify our Discourse, then they had, and want none of their Topicks; so that though our Spirits did not equal theirs, yet in our Pleadings we could not but exceed them. Nor do I value much the Opinion of those, who think the Spirits of such as liv'd in Common-Wealths were Greater, because freer then ours, who live under Monarchies, and being Subjects to none, they had greater confidence then we can have. This is but a Fancy, invented by such as live under that Form of Government: but I have not seen any Switzer, or Hollander, so eloquent as the English, or French; and it enlivens me more to see Kings, and Courts, then to see these busie and mechanick Nations: nor can I think any Spirit can excell much in any one thing, where equality is design'd, and where all such as offer to rise above the Vulgar, are carefully deprest, and sunk down to a Level, as they are under Common-Wealths.

For my own part, I pretend to no Bayes; but
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shall think my self happy, in wanting, as the Fame, so the envy which attends Eloquence: and I think my own imperfections sufficiently repayed by Fate, in that it has reserv'd me for an Age, wherein I heard, and dayly hear, my Colleagues plead so charmingly, that my pleasure do's equal their honour.

A Pleading translated out of French, to inform such as understand not that Language of the way of Pleading there.

An Estate in Land being dispo'n'd to a Woman, and another being Substitute, in case she should die without Children of her own Body; she being condemn'd for Incest, and burnt only in Effigie, the Question is, whether by that civil death, the Condition be purified, as well as if she were naturally dead, and if the person Substitute hath by that civil death, Right to the Estate, without waiting for her natural death?

In favours of the Person thus Substitute, it was Pleaded.

Albeit Matters of Fact do depend entirely upon Nature, and cannot submit themselves to the Authority of Politick Laws, *Ea que sunt facti, nulla constitutione infecta fieri possunt*; yet
Law

Law considers them only in so far as they are necessary and useful for humane Society, and upon that account forces this Maxim to suffer many Exceptions. Thus *bona fidei possessor*, is *per actionem publicianam*, made to have right by an imaginary and fictitious Possession, to that which he never really possessed. *Jus post liminii*, makes us believe him who is a Prisoner of War, never to have been taken Prisoner. And *Lex Cornelia* doth presume, that these who did Test whilst they were Captives, did dye in the City to which they belonged, though they dyed really abroad in their Captivity. All which Instances prove, that the Law doth not subject it self blindly to Nature, but that it can ply Matters of Fact to its own designs, and can by an innocent Cheat adjust them to publick Utility and Advantage.

This Foundation being thus establish'd, let us examine this Condition (if she dye without Children) and let us try if it be so bound up to a Matter of Fact, as that it cannot submit it self to the just and politick Fictions of the Law.

It is certain, that albeit all Conditions be ordinarily meer Matters of Fact, yet this Condition which depends entirely upon the Intention of the Testator, must owe its Form to his Will; and seeing he did fix his first desires and designs upon this Woman and her Heirs, and did call the Person substitute for whom I plead, but in the third place, not to suspend and differr his Liberality, but to oblige my Client to wait, because she and her Heirs did preceed them in the order of his Inclinations: therefore, when Death and Fortune do state her and her Heirs in such a Condition, that neither of them can expect the Succession, there

is no doubt, but his Will doth immediatly transport the Effects of his Liberality to the person substitute, since the persons who preceed them, are by the Law removed out of the way. Nor was it the intention of the Testator to enrich the Fisk any more, then if he had adjected a Condition relating nothing to the purpose, *Veluti, si Navis ex Asia venerit*. From this likeways it follows, that as Succession is one of the ways whereby we acquire in Law civil Rights which depend upon the Law, and which the Law doth not allow to any but to its own Citizens, *Qui habent Testamenti factionem passivam*; So this Condition, *Si sine Liberis decesserit*, is not so entirely and absolutely a Matter of Fact, but that Law and Fact are therein mixed together; and therefore, albeit the death of the first Heir without Children, is regularly understood according to the proper and natural signification of natural Death, yet Lawyers have extended this to civil Death, and have purifi'd the Condition by deportation and other kinds of civil Death. As is clear, *l. ex facto, 17. § ex facto, ff. ad senatusc. trebel. Ex facto tractatum memini, rogaverat quaedam mulier filium suum, ut si sine liberis decessisset restitueret hereditatem fratri suo, is postea deportatus, in insulam liberos suscepit; querebatur igitur, an fidei commissi conditio deficiisset, nos igitur hoc dicemus, conceptos quidem ante deportationem, licet postea edantur efficere, ut conditio deficiat: post deportationem vero susceptos, quasi ab alio, non prodesse, maxime cum etiam bona cum sua quodammodo causa fisco sint vindicanda.*

This woman is condemn'd to be burn'd and strangl'd, she had no Children, and can expect no Divorce; her flight has not only banish'd her

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out of the Kingdom, but that Sentence that has reveng'd her Crime on her Memory, and Picture, has rendered her *servam pœnæ*, the unfortunate Prey of an unfamous Gibbet; How can she then but be repute dead, seeing she is expung'd out of the number of Subjects? And how can that Law which has execute and kill'd her, belye so far its own Authority as to believe her alive, after it has taken so much pains to make us believe she is dead? And after her civil Death, how can it conserve for her a faculty of bearing Children, which may fulfil a civil Condition? I confess that Deportation is not still compar'd to natural Death, and that the Liberty which a banish'd man carrys with him to a forreign Countrey, do's preserve for him all the advantages of the Law of Nations, *Ita ut ea quæ juris civilis sunt, non habeat, quæ vero juris gentium sunt habeat*, l. 17. ff. de penis. But on the contrary, since the being a Slave divests man of his Humanity, and ranks him amongst Beasts, l. 2. §. 2. ff. ad l. aquil. the Law can no more consider him, but as a piece of Moveables, living and animated, as a reasonable Tool belonging to his Master; So that having no Head, nor Will, but his Masters, therefore if the Law allow him to fulfil any Condition, that is upon his Masters consideration, and not his own. A person condemn'd is the slave of his punishment, *Servus pœnæ, magis enim pœnæ quam fisci servus est*, l. 12. ff. de iure fisci: and therefore, the Law reputes him dead, since that Gibbet to which it tyes him can communicate nothing to him, but a cruel Death, and consequently he can fulfil no Condition, l. 17. §. Si quis rogatus ad senatusc. trebel. Si quis rogatus fuerit filiis suis, vel cui ex his voluerit restituere heredi-

tatem Papinianus, l. 8. responforum etiam deportato ei tribuit eligendi facultatem; cui liber factus fidei commissum restitui velit, sed si servus pœna fuerit constitutus, nullo ante concepto filio, jam parere conditioni non poterit decessisseque sine Liberis videtur; sed cum decedit electionem illam quam Papinianus deportato dedit, huic dari non oportet.

Law imitates Nature, and uses the same Authority over a man, as he is sociable, that Nature exercises over him, as he is natural: And hence it is, that the Law governs and regulates Societies for its own advantage, and as it can beget Children, and people Families by Adoptions; So by the same power it can cut off unnecessary Members from Families by exhereditations, and can kill them by condemnatory Sentences, *Servus pœnae in omni jure, verè ac semper similis est mortuus*: Cuiac. obser. l. 3. cap. 10. Law then may justly bury a Criminal, in the unfamous Sepulchre of a cruel Servitude, which takes from him his civil life with his liberty, and can tie him to a long Death and excessive Torment, which may draw out his Torture to a very long continuance, and make him, as *Petronius* speaks, pass but for the pitiful Vision, and horrid Shadow of his own person.

We must then confess, that that Sentence which confiscats his Body and Goods, doth at the same time confiscat his Person and Liberty. It is the Sentence which kills him, and his natural Death following thereafter, doth but execute that Sentence; and as we say, that a Rober has kill'd a Passenger when he gave him the mortal Wounds, though he did not then dye, *Tunc occidisti cum vulnerabas, l. si ita §. ad l. apul.* So by the same reason,

reason, the Judge doth kill a Criminal the very moment that he pronounces the Sentence, and he truly dyes by the Sentence, and not by the Execution, l. 29. ff. de pen. *Qui ultimo supplicio damnantur statim & civitatem, & libertatem perdunt, itaque præ-occupat hic casus mortem, & nonnunquam longum tempus occupat, quod accidit in personis eorum, qui ad bestias damnantur, sæpe etiam adeo servari solent post damnationem, ut ex his in alias quæstio habeatur.* And as the Authority of the Law, may beget a Citizen before his Birth, and receive a Posthume into the Common-wealth before he come out of the Womb, *Posthumus pro nato habetur* : So its Empire may take away the life a long time before a man die. It may preveen his death, and chase him out of the World before death overtake him, which is likewise confirmed per l. *si quis 6. §. Sed & si quis ff. de injust. sed & si quis fuerit capite damnatus, vel ad bestias, vel ad gladium; vel alia pœna quæ vitam adimit, testamentum ejus irritum fiet, non tunc cum consumptus est, sed cum sententiam passus est, nam pœne servus efficitur.* Let us now see if this way of Reasoning drawn from the Roman Customs, can be brought home to our French Practique.

Lawyers who designed to found the Principles of their true Philosophy, upon Maxims, real, solid, and constant, were too clear sighted, to force their Laws to discharge their revenge upon an Image, and an Apparition, to take the Shadow for the Body, and in supposing the name of a Criminal for his person, thereby to challenge their Judges of want of power and precipitancy; and therefore they did not allow, that a person who is absent should be condemn'd, and that the Law

should in vain spend its Thunder upon those whom it could not reach: *l. 1. ff. de requirend: reis.* Since then the Law of the Romans, could not condemn capitally a Criminal who was contumacious, it was easie to them to believe, that a Prisoner who was present and fetter'd, did instantly receive that Death to which he was condemn'd. But since our Statutes ordain a painted and imaginary Execution, either our Statutes and Customs must confess their weakness, and quite these as a meer Mommeries, or else they must necessarily oblige us to believe these Appearances to be Realities, and essay to verifie these civil lyes, in forcing us to believe that these painted Executions are real; that the Originals of those infamous Pictures are no more alive, and that *res judicata pro veritate habetur.*

If the power of a Roman Pretor was sufficient to beget a Child in spite of Truth, and Nature it self, *Plane si denuntiante muliere, negaverit ex se esse pregnantem, tamen si custodes non miserit, non evitabit quominus queratur, an ex eo mulier pregnant sit, quæ causa si fuerit acta apud Judicem, & pronuntiaverit cum de hoc agatur, quod ex eo pregnant fuerit, nec ne in ea causa esse ut agnoscere debeat; siue filius non fuit siue fuit, esse suum, l. 1. §. ult. ff. de agnosc. liber.* or may force a Mother to disown a Child, which is really hers; *Siue contra pronuntiatum fuerit, non fore suum, quamvis suus fuerit, placet enim eius rei Judicem jus facere, l. seq. ff. eod.* By much more reason, may a general Law and Custom universally receiv'd, force Subjects so far to obey their Judges, as to believe that a woman strangled and burnt has lost her life upon the Scaffold, where she has been so publickly and tragically executed.

It is then more just to presume, that this Woman who is condemn'd, is dead without Children, and that her Execution has purify'd the Condition, then that the Pursuer should attend her death, should search out her wandering person, which lurks under so much shame, and pursue her in her flight and banishment through Countries, which are either unknown, or in enmity with ours; and therefore I conclude, that it is most just to put the Pursuer in possession of the Estate.

I have assayed thus to answer the former Pleading, because there is no Answer to it extant in the French, and because such Cases may with us frequently occur.

THe greatest glory of Art is, that it can imitate Nature; and every thing which forces Nature, is hated by men, as folly and affectation; but amongst all those Arts which follow Nature, Law is the chief, for it being the chief product of Reason, it endeavours most to resemble Nature; Reason and Nature being in man the same thing vary'd under diverse Expressions, and Reason being man's Nature. And thence it is, that the Law pyles all its Constitutions to the several degrees of Nature, and observes it exactly before it begin to form a Statute relating to it, *Propter naturam statuitur aliter, quam statueretur alias*, gl. ad l. Julianus, ff. *si quis omiſſa causa*; though it appoints that Consent should oblige, yet it excepts Minors, because of the frailty of their Nature; though it appoints Murder to infer Death,

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yet it pardons such as are Idiots, or Furious; it doth in dubious Cases, prefer that Interpretation, which is most suitable to the Nature of the thing contraverted; it presumes *illud inesse, quod ex natura rei inesse debet*: And it has very well ordain'd, that *ea quæ dari impossibilia sunt, vel quæ in rerum natura non sunt, pro non adjectis habentur*, l. 135. ff. *de reg. jur.* Since then there is nothing so unnatural as to force us to believe, that a Person who is really alive, is truly dead, and that the Children which a Woman may bring forth, shall not be her Children; I see not with what appearance of success the Substitutes can in this case aspire to the Succession now craved. Nature has a fixt Being, and Men know what it determines by consulting their own Breasts, and think themselves happy under the protection of what is sure, and determin'd; but if it were allow'd that Law might vary, and that Lawers might invent such Fictions as these, and by them impose upon others, who not being of their Profession, could not follow all their Subtilties, and Windings; then Law should become a Burden, and be esteem'd an Illusion. And I imagine I hear those amongst whom this Woman lives, laugh at this Discourse, which would force them to believe, that she is dead, and I am sure, that any Countrey Clown may refute it, by presenting the woman, as one refuted a wise Philosopher, who maintain'd, *that there was no Motion*, without any other Argument, than by walking up and down.

The Question then being, whether the Condition, *si sine liberis decesserit*, is purified by a civil Death; and if immediately after she is burnt in Effigie, she can be said, *sine liberis decessisse*, so that the

the person substitute may immediately succeed, & exclude any Children she shall thereafter bear; or if the Substitute must attend her natural Death.

That the Substitute cannot succeed immediately after her being burnt, but that any future Children would seclude him; so that a Natural only, and not a Civil Death, purifies the condition, is contended by these Reasons: First, the Question being, whether this Condition, *si sine liberis decesserit*, respects natural, or civil Death; We must interpret the word Death, so as that we follow the more genuine and natural signification; and I am sure the ordinary and genuine Interpretation of Death, is a Natural and not a Civil Death.

And that this Condition can only be purified, or satisfied by a Natural, and not by a Civil or fictitious Death, is clear by very express Laws, as *l. 8. ff. de cap. dimin.* where it is said, *Eas obligationes quæ naturalem præstationem habere intelliguntur, palam est capitis diminutione non perire, quia civilis ratio naturalia jura corrumpere non potest.* Thus *Gaius*, one of the best Roman Lawyers hath said, that such Interpretations doth corrupt the Law, and in effect mix things that are very different, invading the limits of Nature, and stretching fictions further than they ought to go: and therefore, such criminal Sentences as do not really kill, *sed fitione civili caput dimittunt*, are not termed Death, but a punishment next to Death. *deinde proxima morti pena, damnatio in metellum, l. capitalium, ff. de penis.* This likewise *Papinian* decides, *l. 121. ff. de verb. oblig. in Insulam deportato res promittendi stipulatio ita concepta cum mortis dari non nisi in vivente ei committitur.* And upon the same ground, *l. cum pater, § hereditatem, ff. de legat. 2.* He determines our case expressly, and asserts, that such

Sentences cannot in *fidei-commisſis*, be accounted Death, *hereditatem filius cum moreretur, ſuis vel cui ex his voluiſſet reſtituere fuerat rogatus, quo interea in inſulam deportato, eligendi facultatem non eſſe pena peremptam placuit; nec fidei-commiſſi conditionem, aut mortem filii heredis exiſtere*: With whom agrees, *Paulus l. ſtatus §. Cornelia felici, ff. de jure fiſci*. *Cornelia felici mater ſcripta heres rogata erat reſtituere hereditatem poſt mortem ſuam, cum haeres ſcripta condemnata eſſet, & à fiſco omnia bona mulieris occuparentur: dicebat Felix ſe ante penam eſſe, hoc enim conſtitutum eſt, ſed ſi nondum dies fidei commiſſi veniſſet, quia poteſt ipſe mori, vel etiam mater alias res acquirere repulſus eſt interim à petitione*. Thus we ſee, that all the Roman Lawyers have conſpired to allow only natural Death, to ſatisſie ſuch conditions as this is: Death is the laſt of all things, *rerum ultima linea*; and therefore theſe Sentences leaving ſtill room to Hopes and Expectations, cannot be called Death, which with the Perſon cuts off all theſe. It is thought by the beſt of Men already, that Death comes too ſoon, why then ſhould we precipitat it, and force it upon Men before it's time? And ſince one Death is thought by all a ſevere enough puniſhment, why ſhould we multiply a thing, that is but too oft too unwelcome? Death is too ſerious a thing, to be counterfeited by ſuch Fictions, and too ſevere a thing to be quibled upon, by ſuch Interpretations.

2. If we look to the meaning of the Diſponer, which is the next Rule to be followed in the Interpretation of dubious and equivocal Words, we will find; that it is hardly imaginable, that the Diſponer dream'd of a civil Death; and it is moſt certain

certain, that any man, especially, who was not a Lawyer, would never have figur'd a civil Death; nor is it deny'd, for *fictio* is *mens Legis, non dispensantis*. But how unsuitable were it to natural Equity, and the Principles of Law, that the will of the Disposer should not regulat what is disponed? or why should the Law dispose upon what it did not bestow? 3. Words are to be explain'd in a Disponers Will, as the Disposer would probably have explain'd them himself; If the meaning had been contraverted, at the time of making the Disposition; -But so it is, that if it had been proposed to the Disposer, whether the Children of the Woman institute, should be cut off, in case their Mother should commit a Crime? It is probable that he would not have punished poor Infants, for a guilt to which they were not accessory; and the Law was never more generous, then when it said, *non competere beneficium inofficiosi testamenti post-humis, cum exheredationis causam committere nequeant, nec debent alieno odio pręgravari*, l. 33. §. 1. C. de inoff. test. Nor is it imaginable, that the Testator would have taken from them what he designed, because they fell, without their own guilt, in a condition, which made that which was but liberality to become Charity: And since he designed this for their Mother and them, to supply their wants, it is not imaginable he would have taken it from them, when their wants were greatest. The Children would likewise still continue to be nearer to the Disposer, then the Substitute, *Nam jura sanguinis nullo jure civili adimi possunt*; and since the Blood-relation gave at first the rise to that Nomination, it is probable, that the Effect would not be taken away whilst the Cause

Cause continued. 4. If she can have Children after her being burnt in Effigie, she cannot be said *decessisse sine Liberis*, upon her being burnt in Effigie; but I subsume, that she may have Children, and such too as the Law would acknowledge to be Children: for by the 22. Nov. cap. 8. Marriage is declar'd still to subsist, notwithstanding of any interveening criminal Sentence; for though by the old Law, condemned Persons *pro nullis habebantur*, and so the Marriage was dissolved, yet by that excellent Constitution this was abrogat, *Si enim ex decreto judiciali, in metallum aliquis, aut vir, aut mulier, dari jussus esset, servitus quidem erat & ab antiquis Legislatoribus sancita & ex supplicio illata, separabatur vero matrimonium, supplicio possidente damnatum, sibi que servientem. Nos autem hoc remittimus, & nullum ab initio bene natorum ex supplicio permittimus fieri servum, neque enim mutamus nos formam liberam in servilem statum; maneat igitur Matrimonium hoc nihil tali decreto lesum..* Since then her Husband continued to be so still, and that the Law would acknowledge the Children to be hers, would not the Law contradict it self, if it should say, that she died without Children, and yet should acknowledge that these were her Children? 5. *Post-humus pro iam nato habetur, ubi de ejus commodi agitur;* and therefore by the same Reason of Justice and Equity, the Law should be so far from presuming, that there can be no Children born after the Mother is condemned, that if she shall bear any, it should rather presume them to be already born, to the end they may not be prejudged of the Succession, which would be otherwise due to them; and if *post-humus habetur pro iam nato, ubi agitur de ejus commodi*, much more should

should he be presumed *natus, ubi agitur de damno vitando*; for we are much more favourable in *damno vitando, quam lucro captando*. 6. By the Roman Law. *auth. bona damnatorum, C. de bon. prescript.* The Goods of condemned Persons were not confiscat in prejudice of the Ascendents, or Descendents, to the third Degree, except only in the case of *Lese-majestie*. If then the Crime be not able to seclude Children, it follows necessarily, that Children *quoad* their Succession, are in the same case, as if the Crime had not been committed, and if the Mother had committed no Crime, here there had been no place either for the Substitute, or for this Question. It is just that *delicta suos debent tenere authores*; and that since punishment is only justified by the preceding guilt, that the Punishment should not exceed the guilt, and that the Right designed for the Children by the first Disposer, should not be taken away from them by the Mothers fault: this were also to add Affliction to the Afflicted, to make poor Infants lose with their Mother, their Patrimony, and to impoverish them most, at an occasion, when to give them, were Charity.

I confess that Law sometimes doth recede from Nature, and invents pretty Fictions, as in the cases proposed of *ius p^{ost}-liminii*, *adoptivis*, and *Legis Corneliae*; but it doth so, very sparingly; nor are these Fictions ever allowed, except where they are introduced by an express Law; for the Law thought it not reasonable to allow every Judge or Lawyer a Liberty to Coin his own Caprice into a Fiction, lest so, unreasonable Fictions might be introduc'd, and lest the people might be ignorant of what they were to follow. Since then
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the Pursuer founds his strongest Argument upon this, as a priviledged Fiction; he must instruct that this Fiction is founded upon express Law, and even in these Fictions, Law never inverts Nature, but rather seconds it, and it makes not Nature bow to these, but these to Nature; and amongst many other instances, this is clear by Adoptions, wherein the Younger cannot adopt the Elder, because it were against Nature, saith the Law, that the Younger should be Father to the Elder, *Inst. de adopt. §. 4. Minorem natu majorem non posse adoptare placet, adoptio enim naturam imitatur, & pro monstro est, ut major sit filius quam pater.* And I may by the same Reason say, that it were monstrous to imagine, that she who may really labour in Child-birth, and who really may give Suck, cannot bring forth a Child, but is dead; and that the Law should not own as Children, these whom the Church owns as such. And in these fictions which are allowed, we will find upon exact inquiry, that Law has not designed to overturn Nature, but only has made bold by these fictions to dispense with some of its own Solemnities, as is clear by the Law *Cornelia*, wherein the Romans did by that legal Fiction imagine, that he who died in prison among the Enemies, in a Forreign Counrrey, died at *Rome*, and at freedom, meerly that they might by that Fiction render valid the Testament of him who was a Prisoner, for the Honour of their Common-wealth; and whose Testament could not have subsisted without this Fiction, seing none but a free Citizen could amongst them make a Testament. Since then there is no need of such a Fiction as this, and since there is no express Law, introducing it specifically in
this

this Case; there is no reason, that it should be allowed to take away the benefit of the Disposition from the person Substitute, which it gave not. *Nihil tam naturale* (says the Law) *quam eo genere quidque dissolvere, quo colligatum est.* l. 35. ff. de reg. jur. Since thence the Children owe not their Succession here to the Civil Law, but to the Will of the Disposer, the Law should not by its Fictions, take away what was not at first the Effect of its Liberality.

In the Cases where the Law allows Fictions, it allows them only for to strengthen natural Equity, and not to overturn it, and by the Definition given of it, it is said to be *indubitata falsitatis pro veritate assumptio, in casu possibili, & ex justa causa proveniens, ad inducendum juris effectum equitati naturali non repugnantem.* *Jason. ad l. si is ff. de usucap:* Upon which definition, no Subsumption can be founded here, for not only is not this in *casu possibili*; because it is impossible, that a person can be both dead and alive at once, and that Children should be, and not be; *Verum est, neque pacta, neque stipulationes, factum posse tollere, quod vero impossibile est, neque pacto, neque stipulatione potest comprehendere, l. 32. ff. de reg. jur.* But it is also repugnant to Justice and Equity, that the Estate designat by the Disposer to his Blood-relations, should be taken from them, and given otherwise than he would have bestowed it himself; and though the Law doth sometimes in favours of Children, oblige us to believe, that the Child that is in the Mothers Womb, is born, there is some Foundation for imposing that upon us, since there is a Child extant, though not born; yet it never uses that liberty in punishing poor Infants, and to condemn

damn them before it can know them, or that they have transgressed.

In Answer to the second Classe of Arguments, I do confesse, that it is true, that all Civil Rights should perish by a criminal Sentence, and that in *sensu civili, pro nullo habebatur damnatus*; but it is as true, that *ea quæ sunt juris naturalis* were not thereby taken away, *quod attinet ad jus civile, servi pro nullis habentur, non tamen & jure naturali, quia quod ad jus naturale attinet omnes homines æquales sunt. l. 32. ff. de reg. jur.* But so it is, that to bear Children, is in her no Effect of the Civil Law, but of the Law of Nature, and the Children to be procreat by her, will be her Children by the Law of Nature; so that since she can bear Children, she can yet fulfill the Condition of the Institution; nor can she be debarr'd from that, by being *serva pene*, at least her Children cannot, seeing they are not condemned by her Sentence: Condemnatory Sentences, take only from the person condemned, what may belong to the Fisk; for it substitutes the Fisk, in place of the person condemned, but it takes not from him what can not belong to the Fisk. *Ea sola deportationis sententia aufert, quæ ad fiscum perveniunt*; But so it is, that it was never designed, that the Fisk should succeed in place of the Person to whom the Disposition was made, as is acknowledged by the Substitute, who now craves preference; and if the Fisk would be preferred to the womans Children, much more would he be preferred to their Substitutes, who succeed only to them. And the reason of the Decision, *l. ex factis ff. ad sc. trebel.* is not found in odium of the Children, but of the Fisk. *Maxime cum etiam bona, cum sua causa, fisci sunt vindicanda.* But the solid

Answer

Answer to that, and all these other Laws, is, that by the old Roman Law, *damnatus erat servus pena*, & *servus pena parere conditioni non poterat*, & *pro nullo habebatur*; and therefore, by that Law, *parere conditioni non poterat*, as is clear by the Law cited: But Justinian did abrogat that amongst many other unreasonable Fictions, and by *nov. 22. cap. 8.* This *servitus pena* is clearly abrogated, and therefore since the Foundation of the Decision is taken away, the Decision can now no longer take place, and by all the Laws in Christendom, those Servitudes are now abrogated; and our blessed Saviour, has by his coming to the world, set Mankind at liberty in all respects, and we can be slaves to nothing now, but to our Vices. Nor doth the Law look upon a person condemned, as a dead person, in all respects, which is the third great Foundation of all that is pleaded against my Client; for it allows her to propone her just Defences, and it would punish him who kill'd her upon a private Revenge; it would acknowledge her Children to be lawful; and until she be really dead, her Husband could not marry another: for though the Law, to deter men from committing Crimes, doth oftimes raise its Terrors by Civil fictions; yet it is the nature of these Civil fictions, that they cannot be stretch't *de persona in personam*; though then it will not allow such to be thought still alive, who are struck with it's Thunder; yet this Fiction reaches only to the Offender, in so far as concerns her Civil Capacities, and the punishment of her guilt; and therefore seing the Blood is not tainted by this Sentence, she not being here condemned for Treason, which is the only Crime that taints the Blood, her

her Children, though born after the Sentence, would still succeed to her, and since they would be acknowledged to be her Children, she cannot be said *decessisse sine Liberis* : which is the Condition upon which the Substitute craves to be preferred.

The Parliament of Burgundy found, that a natural Death, could only purifie this Condition, Si sine liberis decesserit.

For *Haining*, against the Fishers upon *Tweed*.

FIRST PLEADING.

How far a man may use his own, though to the prejudice of his Neighbours.

H*Aining* being prejudged by a Lake which overflowed his Ground, and which by its nearness to his House, did, as is ordinar for standing Waters, impair very much the health of his Family : He did therefore open the said Lake, whose Waters being received by *Whitticker*, did at last run with *Whitticker* into *Tweed*. The Fishers upon that River, pretending that the Water which came from that Lake, did kill their *Salmond*, and occasion their leaving the River, do crave that *Haining* may be ordain'd to close up that Passage. This being the state of the Case, it was alledged for *Haining*,

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That since men had receded from that first Community, which seem'd to be establish'd amongst them by Nature, the Law made it its great Task, to secure every man in the free and absolute exercise of his Property, and did allow him to use his own as he thought fit, and what ever did lessen this power and liberty, is by the Common Law term'd a servitude, or slavery: nor can a servitude be imposed upon a Man without his own consent, and suitably to this Principle, every man may raise his own house as high as he pleases, though he should thereby obscure the Lights of his neighbours house: or if I should abstract from my neighbours Ponds, that Water which formerly run into them from my Lands, the Law doth not think him prejudged, nor me obliged to prefer his conveniency to my own Inclinations, as is clear by *l. 26. ff. de damno infect.* For as that Law very well observes, He is not prejudged who loses a Benefit which flow'd from him who was no way tyed to bestow it, *l. 26. ff. de dam. infect.* Proculus ait, *Cum quis jure quid in suo faceret, quamvis promississet damni infecti vicino, non tamen eum teneri ea stipulatione: veluti si juxta mea aedificia habere aedificia, eaque jure tuo altius tollas, aut si in vicino tuo agro cuniculo, vel fossa aquam meam avoces. Quamvis enim & hic aquam mihi abducas, & illic luminibus officias, tamen ex ea stipulatione actionem mihi non competere: scil. quia non debeat videri is damnum facere, qui eo veluti lucro quo adhuc utebatur, prohibetur: multumque interesse utrum damnum quis faciat, an lucro, quod adhuc faciebat, uti prohibeatur.* And if I dig a Well in my own house, which may cut off those Passages whereby Water was conveyed to my neighbours Well, one of the greatest

greatest Lawyers has upon this case, resolved, that my neighbour will not prevail against me; For, saith he, *no man can be said to be wrong'd by what I do upon my own ground, for in that I use but my own right; l. 24. §. 12. ff. eod. In domo mea puteum aperio quo aperto vena putei tui precise sunt, antenear? Ait Trebatius, Me non teneri damni infelli, neque enim existimari operis mei vitio damnum tibi dari, in ea re, in qua jure meo usus sum: where the gloss observes, that in suo quod quisque fecerit, in damnum vicini id non animo nocendi facere presumitur. And if by a Wall or Fence upon my Land, the Water was kept from overflowing my neighbours Land, I may throw down my own Fence, though my neighbours Land be thereby overflowed, l. 17. ff. de aqua pluvia; And therefore, seeing the ground doth belong to Haining, and that the Fishers of Tweed have no servitude upon him, he may use his own as he pleases, especially seeing he doth not immediatly send his Water into Tweed, but into another Rivolet, which carries it very far before it doth disgorge there. So that if the Fishers upon Tweed did prevail against Haining, they might likewise prevail against all, from whose Ground any Moss-water runs into Tweed; though at fifty miles distance; and they may forbid all the Towns from which any Water runs into Tweed, to throw in any Excrements, or any Water employed in Dying, lest it prejudice their Salmond-fishing; whereas, *Alteri prodesse, ad liberalitatem, non ad justitiam pertinet.**

It is (my Lords) referr'd to your consideration, that publick Rivers have been very wisely by Providence, spread up and down the World, to be easie, and natural Vehicles for conveying away to the Sea, (that great receptacle of all things
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that are unnecessary) Excrements, and other noxious things, which would otherways have very much prejudg'd Mankind; and that they may the better perform this Office, Providence has bestowed upon Rivers, a purifying and cleansing quality, so that after a little time, and a very short course, all that is thrown in there, doth happily lose their noxious nature, which is washt off by the Streams by which they are carried.

Rivers are Natures high-ways by Water, and we may as well forbid to carry any thing which smells ill, upon our high-ways by Land, as we may forbid to throw in stinking Waters into our Rivers. The proper use of Rivers is, that they should be Portable, and fit for Navigation, or for transporting things from one place into another; and Salmond-fishing is but an accidental Casualty, and therefore the only interdicts, or prohibitions propon'd by the Law, relating to publick Rivers are, *Ne quid in flumine ripave ejus fiat, quo pejus navigetur*, tit. 12. lib. 43. and, *ut in flumine publico navigari liceat*, tit. 14. ff. eod. lib. But in Rivers that are not navigable, the Law has forbidden nothing, but that their course and natural current be not alter'd, *Ne quid in flumine publico fiat, quo aliter fluat aqua, atque uti priore estate fluxit*, tit. 13. *ibidem*. So that since the Law doth not forbid the throwing in any thing into publick Rivers, it doth allow it; for it is free for every man to do what the Law doth not prohibit, and if upon such capricious Suggestions, as these, Men were to be restrain'd from using their own, no man should ever adventure to drain his Land, to open Coal-sinks, or Lead-mines, or to seek out any Minerals whatsoever, whose Waters are of a

ther the most pestilentious, because after he had bestowed a great deal of expense, he might be forc'd to desist, for satisfying the jealousy, or imagination of melancholy, or avaritious Neighbours. And if this pursute find a favourable hearing, malice and envy will make use of it, as a fair occasion whereby to disturb all successful, and thriving Undertakers. But your Lordships may see, that the World, both learn'd and unlearn'd, have hitherto believ'd, that such a pursute as this would not be sustain'd, in that though interest and malice did prompt Men to such pursutes, yet not one such as this has ever been intended, for ought I could ever read, save once at *Grenoble*, where an Advocat did pursue a Smith to transport his Forge from the Chief-street, because it did by its noise disturb not only him, but the people who frequented that street; from which pursute, the Smith was absolv'd, as *Expilly* observes in his Pleading.

Yet, my Lords, the Fishers upon *Tweed*, want not some apparent Reasons which give colour to the pursute; and it is urg'd for them, that no man is so Master of his own, but that the Commonwealth has still an Interest with him in it, and Law being invented to protect the Interest of Societies, as well as to secure the Property of private persons, therefore though every private man inclines to satisfy his own humour, and advantage, in the use of what is his own, yet it is the Interest of the Commonwealth, that he do not abuse his own Property; and therefore it is, that the Law doth interdict Prodigals; nor will the Law suffer that a man use his own *in emulationem alterius*, l. 3. ff. de. oper. pub. And a man is said to do

do any thing *in emulationem alterius*, when others loses more by what is done, then the Proprietar can gain : As in this case, though *quilibet potest facere in suo*, yet *non potest immittere in alienum*, which is their case ; and all the Arguments brought for *Haining* do not meet, seeing they only prove, that a man may use what is his own as he pleases, *ubi nihil immittit in alienum* ; as is clear by the Instances given, of throwing down his own VVall, or the digging up a VVell in his own Land, which differs very much from our case, wherein *Haining* doth pour in his poysonous VVater into the River of *Tweed*.

That men are restrain'd for the good of the Common-wealth in the use of their own Property, is very clear from many Instances in our Law, as men are discharg'd by Acts of Parliament to burn Muirs, to kill Smolts ; the way and manner of fishing upon *Lochleven*, is prescribed to the Heretors, by Act of Parliament, and men are forbidden to steep Lint by publick Acts likewise. Likeas, the common Law will not suffer men so to use Water running through their own Land, as that they may thereby prejudice Milns belonging to their neighbours, which use to go by that Water, and whatever may be alledged in favours of any innovation in running Waters, yet Lakes being appointed by Nature, seem to have from Nature a fix'd being ; nor should they be opened to the prejudice of others, contrary to their Nature. These Objections may, (my Lords) be thus satisfied. To the first, it is answered, that the only two Restrictions put upon men, in the free exercise of their own, are, *ne in alterius emulationem fiat*, *vel materiam seditionis prebeat*, as is clear by the

the foresaid, l. 3. ff. *de. oper. pub.* Neither of which can be subsumed in this case. And when the Law considers what is done in *emulationem alterius*, it acknowledges, *illud non factum esse in emulationem alterius, quod factum est principaliter ut agenti proffit, & non ut alteri noceat*, l. *fluminum* §. *fin.* ff. *de dam. infect.* And the Gloss formerly cited upon the Law determines, that *Animus nocendi* is not presumed, if any other cause can be assigned: And in this case, *Huizing* can ascribe his opening this Lake, to the prejudice it did to his Land, and to his Health, whereas it cannot be alledged, that he ever exprest any Malice against the Fishers upon *Tweed*, many of whom are his own Relations. As to the Instances given, wherein the Law doth restrict the free use of Property, the Principle is not deny'd, but it is misaply'd. For the Law only bounds the Proprietars power in some cases, wherein his loss may be otherways supplied; as in Mureburn, and killing of Smolts at such a season of the year, and in steeping Lint in running Waters, which may be as commodiously done in standing Pools; but these Pursuers crave this Lake to be stopt at all times, nor is there an apparant Reason here as there, this Pursuit being founded only upon a conjectural prejudice, and in these Cases, the Prohibition is made necessar by the generality, and frequency of Occurrences, and yet though so circumstantiated, there is still a publick Law necessar. And when a publick Law discharges the free exercise of Property, it ordains him in whose favours the Prohibition is, to refund his Expences who is prohibited: Nor is the Common-wealth here prejudged so much by this, as it would be by the
contrary

contrare, for thereby all Coal-heughs, Lead-mines, and the winning of other Minerals would be discharg'd; whereas it is uncertain if this Water chaseth away the *Salmond*, which are at best but a Casualty, and which will go but from *Tweed* to other Rivers in *Scotland*, for they cannot stay in the Sea. *Salmond*-fishing is but an accident to Rivers, but there being the common Porters is their natural use. Thus (my Lords) you see that we contend for what is natural to Rivers, they for what is but Casual; we are founded upon the nature and privilege of Property, they upon meer Conjectures.

The Lords inclin'd to sustain Hainings Defence; but before Answer, they granted Commission for examining upon the place, what prejudice was done.

For the Viscount of *Stormont* against the Creditors of the Earl of *Annandail*.

SECOND PLEADING.

Whether a Clause prohibiting to sell, will prejudice Creditors.

THe deceast Viscount of *Stormont*, having by his Majesties favour, and his own industry, acquired the Lordship of *Scoon*, he did tailzie the same to *Mungo* Viscount of *Stormont*, and the Heirs-male of his body; which

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failing, to *John Earl of Annandail*, and the Heirs male of his body ; which failing, to *Andrew Lord Balvaird*, and the Heirs-male of his body ; and to perpetuat his own memory, as the reward of his Industry, he did cause insert this Provision in the Charter and Seafine, *viz.* That it should not be lawful to the said *Mungo*, to dispoⁿe, or wodeⁿ set any of the saids Lands so tailzied, or to do any deed whereby the saids Lands might be evicted or apprised from them, without the consent of all the persons contained in that Tailzie, or their Heirs ; which if they contraveened, that they should, *ipso facto*, lose all Right or Title to the saids Lands, and the Right should accress to the next Heir.

The late Earl of *Annandail*, having very profusely and unnecessarily, spent not only his own Estate, but likeways contracted Debts, for which the Lordship of *Scoon* is apprised, this Viscount of *Stormont*, as immediat Heir of Tailzie, craves that it may be declared, that the Right to the said Lordship of *Scoon* is devolved upon him by the foresaid Contravention, and that he should enjoy the said Estate, free from any Debts contracted by the Earl of *Annandail*.

Though this pursute appears clearly to be founded upon the expres will of the first Disponer, who as he might not have dispoⁿed, so might have qualified his Disposition with any Conditions he thought fit ; and albeit such Clau^ses as these tend effectually to preserve illustrious Families, yet the Creditors of the late Earl of *Annandail* do alledge, that though this his contracting of Debt may furnish Action against the Earl of *Annandails* Heirs, for any prejudice they can sustain by his contra-

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veening the foresaid Provision, and though by vertue of this *Pactum de non alienando*, all the persons in the Tailzie were bound up from selling the saids Lands; yet no Paction, nor Provision could annul Debts, which were *bona fide* lent by them, to a person who stood in the Fee. Which Defence they urge by many specious Reasons, as first, That there is nothing so contrary to the nature of *Dominium*, and Property, as that he who is Proprietar should not have the free exercise of his Right and Property, which free exercise consists in the liberty to alienat, and to make use of what is his own, for defraying his just Debt, and answering his necessar Occasions: and they pretend, that it were most absurd and inconvenient, that a person should be raised to the title and dignity of a Nobleman, and should be confest by the Law, to have an absolute Right to an Estate, and yet that though he were Captive in the Turkish Gallies, he should not be able to raise money for redeeming himself from that Bondage, and which seems yet more repugnant to the Inclination, and interest of the Disposer, that if a Fine were imposed with assurance, that if the Fine were not payed, the Estate should forfeit, yet the Proprietar behoved idly to stand, and see the Estate sink. And though an advantageous occasion offered of buying his own Superiority, his Multer, or any such advantage; yet the Heir of Tailzie could not raise money for that use, nay nor for alimenting himself, if the Rents perish'd by War, or other Accidents. This is to have, and not to have an Estate, a paralitick Property, and an useless Right. To allow, that such a Clause in a Charter, might annul all the Debts contracted by him

to whom it is granted, were to destroy and ruin
 ine Commerce, which is the very soul of a Com-
 mon-wealth, and which by how much it is incum-
 bred by unexpected Clauses, is by so much im-
 pared and burdened. Commerce doth oftentimes
 require speedier returns, and dispatch, then can
 allow a serious consideration, of all the Securities
 and Evidents of those, with whom we deal; nei-
 ther are these always ready to be produced, nor
 doth the Law in what relates to commerce, con-
 sider all that a Lender may do for securing him-
 self, but what is ordinarily done; and it is most
 certain, that the most exact men, do not enquire
 into the Securities of those with whom they con-
 tract in lending money; and though something
 may be pleaded in favours of ordinary Clauses,
 which either Law, Customs, or Decisions have al-
 lowed; yet it were extraordinary prejudicial to
 Commerce, to make a man forfeit his Sum, be-
 cause he did not guard against *pactum de non con-*
trahendo debitum, a Pactum as unsuitable to the
 nature of Propriety, as unusual in this Kingdom:
 and though the Legislators do in some places al-
 low such Pactums as these, as is clear in *Lege Ma-*
goratus in Spain, yet they are made tollerable
 there, because being introduced by a publick
 Law, they are universally known, and he who
 contracts with persons so prohibited there, for-
 feits his Sum, because he neglects a publick Law,
 and not because he contemns the private prohibi-
 tion of a Disposer. Nor are such Pactums as these
 to be so severely observed, as necessar for preser-
 ving Noble Families, and so fit for our Kingdom,
 which subsists by these; for if the nature of Pro-
 priety were to be alter'd, in so high a measure

as it is by this Pactiō, it could in justice only be altered by a publick Law, wherein the Estates of Parliament (who are with us only Judges of what is convenient for the Nation in general) might declare, that it were fit to turn such a Pactiō as this into a Law : and since for so many Ages, the Parliament has not thought this fit, nor have privat Families ever introduced any such Pactiōs till now, we must either judge, that these are not fit for privat Families, or that those understood not their own Interest.

As to strict Law, whereupon this Pursute is only founded, the Creditors do represent; that though Lawers have allow'd *pactum de non alienando*, yet they have extended it no further, then to annul Dispositions made contrary thereto; but they never stretch'd it so far, as to annul all Debts contracted, by the person prohibited to dispoſe, *l. ea Lege, C. de condict. ob. caus. det.* 2. Though they allow'd these Prohibitions, *quando induit e-rant à Lege, à Judice, aut à Testatore per ultimam voluntatem*; yet they did not allow so much favour to Prohibitions, which are only founded *super pactis viventium*, as is clear by *Craig. l. primo diges. 15. Omnes terræ, (inquit ille) in Feudum dari possunt, nisi quæ à Lege, aut Testatore in ultima voluntate dari prohibentur.* 3. Lawyers do not allow, that such Prohibitions as these, though resolutely conceived, should absolutely annul all Alienations made by the person prohibited, except the Prohibiter reserve some *Dominium* and Property to himself in the thing dispon'd, by virtue of which reservation, he has power to quarrel all deeds done, and the person to whom he dispoſes, is because of that reservation, not so

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absolutely

absolutely in the Fee, or Property, as that his Disposition should be unquarrelable ; as is clear by *Bartol*, and *Baldus*, both *ad l. Sancimus. Cod. de reb. alien. non alienand.* where they conclude, *quod si is cui promissum est, de non alienando reservavit sibi jus aliquod in re, hypotheca, vel dominii, impeditur translatio, aliter non, & etiamsi pactum adhibitum sit in ipsa traditione, & cum pacto resolutive, tamen non impedit dominii translationem, sed illo casu alienans tenetur tantum ad interesse.* And therefore, seeing the Disposer reserved no Right to himself, but that the late Earl of *Annandail* was fully in the Fee. It were against the principles even of strict Law, that Debts contracted by him should be annulled, as contrary to the Prohibition. 4. When a person is prohibited to alienat, that Prohibition is still restricted to voluntar and unnecessar Alienations ; the Design of the Disposer, being to curb such of his Successors, as should be luxurious, but not to bind them up when frugal, in occasions that are necessary and advantageous ; and the Law is content to own such pactions, *in odium* of such as have fed the luxury, or prey'd upon the simplicity of those with whom they contracted, without any design to Vex Commerce, or to preclude those successours from being relieved in their honourable and necessar occasions. *Prohibita alienatione, tantum voluntaria prohibita censentur, non vero necessaria, necessitas enim Legem non patitur*, as *Reiters* observes, *tract. de alien. cap. 6, sec. 4.* which may be further clear, *per l. 5. ff. de per. hered. & l. 69. §. 1. ff. de legat. 2.* And suitably to this, though in our Law Ward-lands recognise if they be voluntarily dispon'd without the consent of the Superiour, yet he is allowed to sell the

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less half of his Lands, without the Superiors consent, which is allowed by the Law to relieve his Necessities ; and though he cannot voluntarily alienat the greater half, yet all the Few may be appressed from him by his Creditors, for satisfaction of his just Debt. And therefore, seing the late Earl of *Annandail* was known to be a judicious person, and to have lived very soberly, and that these Debts can be instructed to have been contracted, for relieving him out of the Necessities unto which he was thrown by the iniquity of the times, and his constant adhereing to his Majesty ; It is by these Creditors pretended, that these Debts cannot be annull'd, as contrary to that Prohibition, which they neither did, nor were obliged to know. And since our Law has thought, that Inhibitions and Interdictions should be published, and registrat for putting the Subjects in *mala fide*: It can never allow, that such Clauses as these which are neither published, nor registrat, should produce the same effect.

To these Arguments, they add, that God Almighty has oft-times testified his Displeasure against such Clauses, whereby, his Providence is insolently bounded by vain Man, who endeavours to build himself a Babel against Heaven ; and by which Clauses likewise, Man will endeavour to perpetuat his own memory here, and call his Land to all Ages by his own Name, against the express Advice which the Scriptures gives.

I do confess, (my Lords) that these specious pretences, especially when prest with so much Zeal, and Eloquence, may make Impressions upon such as are not intimatly acquainted with the Principles of Law ; but I hope, where we have

such Judges as your Lordships, there can be little hazard from such Objections: but before I endeavour to satisfy these, I crave leave to lay out before your Lordships, those grounds whereupon my Client founds his Pursute.

It is an uncontraverted, and first Principle of Law, that *quilibet est Dominus, & arbiter rei sue*, and therefore may dispose upon his own as he thinks fit; nor can any thing less than a Law bound the exercise of this Power; and every man being Judge of his own conveniency, Lawyers do very properly term the conditions adjoined by a Disposer, *leges contractus*, and the Feudalists call the Conditions under which a Few is disposed, *leges feudi; feuda* (saith Zasius) *a pactis contra naturam suam sunt transmutata, pacto pręgravante naturam feudi*: and albeit our Law defer'd very much to equity, and to the principles of the civil Law; yet privat transactions betwixt parties, are not to be limited by those: But pactions are to be observed amongst them in their full extent, as is ordain'd with us by an Act of Sederunt, 1573. Law may be receded from by privat Pactions; and therefore, much more must privat Pactions bind, where they are contrary to no exprefs Law: And since *pactum in re familiari æquipolet juri publico*, Reg. Maj. lib. 3. cap. 10. & lib. eodem cap. 31. It necessarily follows, that as a Law or Decision, might have established their Pactions, *de non alienando, & non contrahendo debitum*, which is acknowledged by the Creditors themselves, that a Condition insert in a Charter may do the same as effectually: And if the pretence of publick Equity and Commerce, might alter the destination of a Disposer, or mutual Pactions of privat Persons.

sons, what uncertainty would this occasion in Humane Affairs? Or who would be secure, that the Transaction he made, should hold? For there are few men who do not differ in their Conceptions about publick Commerce; this were to unhinge all private Pactions, which persons had at first suited to their own necessities, and inclinations, and to make Judges who should be ty'd to a fixed Rule, unrestrain'd Arbiters, over the Affairs and Fortunes of the people: for they might, almost in all Cases, recede from private Transactions, upon pretext that they are contrary to Publick Good, Equity, or Commerce. But if any Conditions adjected by Disponers are to be observed, surely those which are adjected in a free Gift and Donation, are most to be observed; and it is certainly contrary to reason, that he who needs not dispoise his own Land except he please, may not dispoise it as he pleaseth.

As the Law hath been very tender of the Interests of all Proprietars, so of all others, it hath been most tender of those Rights, whereby men have declared how their will should be obey'd, and their Memory perpetuated after their death. Law designing thereby at once to encourage men to be frugal, because they may know that what they have gain'd by their Industry, shall be disposed of according to their will; and to comfort men against death, because they may know that their will shall be as exactly execute, as if they themselves were still alive, *Uti quisque de re sua legassit, ita jus esto*. The Law in all Contracts, considers most, what was the design of the Contractors, and when any thing is dispois'd for a particular Cause, when that Cause fails, the Disposition

tion falls as *causa data, causa non sequuta*, & si ea lege donavi, defectus causa impulsiva resolutionem contractus inducit, quia ea lege donavi cum alias non essem donaturus, l. cum te. c. de pact. inter empr.

That such pactions as these are very lawful, and ordinary, is clear, both from the civil, and feudal Law. For by the civil Law, though there were not Tailzies, yet the Romans had their *fidei commissa*, which did very much resemble them, and by which the person *cujus fidei res erat commissa*, could neither dispoise nor impignorat; and if he did dispoise or impignorat, that person in whose favour the *fidei commissum* was granted, might not only pursue the Dispoiser for damage and interest, but might likewise annul what was done contrary to the trust, as is clear, l. fin. cod. de reb. alien. non alienand. Sancimus, siue lex alienationem inhibuerit, siue testator, hoc fecerit, siue pactio contrahentium hoc admiserit, non solum dominii alienationem, vel mancipiorum manumissionem esse prohibendam, sed etiam usus fructus dationem, vel hypothecam, vel pignoris nexum penitus prohiberi; similique modo, & servitutes minime imponi, nec emphyteuseas contractum, nisi in his tantummodi casibus, in quibus constitutionum auctoritas vel testatoris voluntas, vel pactionum tenor qui alienationem interdixit, aliquid tale fieri permiserit.

These Clauses, *De non alienando*, & *non contrahendo debitum*, are most allowable by the Feudal Law, where such Tailzies are called *Feuda Gentilitia*, & *Feuda ex pacti Providentia*; yea, and by the Feudal Law, it was not in the power of him to whom it was first dispoised, to alienate or affect the Feu, either in prejudice of the Superior, or of him who was next to succeed: and what is more

more ordinar with us, then such Obligations in Contracts of Marriage? Sir Thomas Hope is of Opinion, that a Right granted to a man and his Heirs, secluding Assignees, could not be comprised by a Creditor; and sure that exclusion is not so valid, as a Clause irritant and resolute, which is *actus maxime explicitus & geminatus*.

From these Principles, there do arise very natural Answers to the alledgeances proponed for the Defenders; for whereas it is contended, that such restraints as these are inconsistent with Property, It is answered, that there is nothing more ordinar, then to qualifie Propriety, as appears clearly by the nature *fidei-commissi*, *pacti gentilitii*, and very many other instances; and even in our Law, Ward-lands cannot be disposed upon, without the consent of the Superior; and it is more contrary to the nature of Property and *Dominium*, that a man cannot dispoise upon what is absolutely his own, under what restrictions and qualifications he pleases, then that he who hath only a qualified *Dominium*, should be in a capacity to dispoise absolutely, upon what was not absolutely his own. That Maxim whereupon we found, that *quilibet est moderator & arbiter rei sue*, has no exception exprest in it; whereas the definition of *Dominium* insisted upon by them, which is, that it is *Jus de re sua libere disponendi*, has an exception adjected to it, which is, *nisi quæ Lege prohibeatur*; under which word *Lex*, the Doctors always comprehend *Pactum*, and to prevent all mistake, some do expressly say, *nisi quis Lege vel Pacto prohibeatur*: So that in vain do they found upon the nature of *Dominium*, since the very definition of it doth contradict what is alledged.

To the second difficulty, bearing, that these Clauses are destructive of Commerce; It is answered, that the liberty of disposing upon our own, as we think fit, doth more nearly concern us, than the liberty of Commerce; especially in this Kingdom, which stands more by ancient Families, then by Merchants; and therefore seeing these Clauses tend necessarily to perpetuate Families, and the other doth only tend to the better being of Trade, we ought to prefer the Pursuit to the Defence. And to what purpose shall we gain an Estate by Commerce, when we cannot secure it by such Clauses? Nor are these Clauses destructive of Commerce, as is alledged, more then Inhibitions or Interdictions, and it is easier to read a Charter, then to try the Registers; and *England* and *Spain*, which are more interested in Commerce then we, have by allowing such Clauses, evidently declared, that they think them not absolutely inconsistent with Commerce. But the truth is, real Rights are not the foundation of Commerce; for Commerce is maintain'd upon the stock of personal Trust, and the main thing which Traffickers rely upon, is the personal Trust which amongst them, and not the consideration of any real Rights.

I do not conceive my self obliged, to take much notice of the Creditors, being in *bona fide* to contract with the Earl of *Annandail*; for if *Annandail* had no power to burden that Estate, their *bona fides* could not give it him; nor could a Creditor apprise from him that to which he had no right, no more then I can comprise one mans Estate, for another mans Debt: and if *Annandail* had only given a Back-bond, declaring that the Estate

was only in his person by way of trust, the Creditors could not have apprised it for their Debt, though they might likeways have alledged that they were in *bona fide* to lend. For, the Law considers only *bona fides*, where those who alledged the *bona fides*, did exact Diligence, which these Creditors cannot alledge; for if these Creditors did not at all call for *Annandails* Rights to *Scoon*, they cannot be said to have laid out their Money in contemplation of those Rights, but in contemplation of his other Estate, or upon the Account of a personal trust; or if they did call for those Rights, they might have very clearly seen his Prohibition, and consequently would have been secured against lending upon the faith of this Estate.

Whereas it is urged, that such Prohibitions as these, are only allowed, when they are introduced by Testament, by a Law, or by a Judge; but not when they are introduced by Contracts or Dispositions *inter vivos*. It is answer'd, that if it be allowable the one way, it should be the other; for the design is rather more deliberat in a Disposition, then in a latter Will: for the one uses to be an Act of Health, and the other of Sicknes, and the one is as contrary to Commerce, as the other is; and if any weight be laid upon the favour allow'd by the Law to *ultima voluntas*, upon the account of consoling the Testator, in obeying what he designs, this favour is equally communicable to both, for in both, there is a Designation made of the manner and way of Succession, in which a dying man is as much concerned, when he makes a Designation by a Disposition, as when he makes it by a Testament; and therefore, *Les substitutions contractuelles ont les mesmes. Effects en France,*

France, *que les Testamentaires, dans la prohibition d'aliener*, as Lowet observes, *tit. 5. num. 9.* and for which he cites many Decisions; and where he observes very judiciously, that the reason why the Roman Law did not allow these Substitutions, and Prohibitions in Contracts, as it did in Testaments, was, because Testaments was the only way amongst them of disposing upon Estates, and of making Substitutions, and *fidei commissa*; to make which was not allow'd by Contracts, *quia auferebant testandi liberam facultatem*, which subtilty is not allow'd in this Age: for on the contrary, Tailzies and Contracts of Marriage, are now the ordinary ways of disposing Estates, and if men might alter such destinations of Contracts, such as do contract with them would be in a hard condition.

Nor is there more weight in that part of the alledgeance, which bears, that those Prohibitions do only annul deeds, done in favours of him who has reserved some Right in his own person; for Tailzies with such Prohibitions, do imply a reservation in favours of those who are to succeed, and the Tailzie is in that case but a Right of Trust to the behove of the Family; and the Provision in their favours, is equipollent to a reservation. The design of both is the same, and therefore they should both operat the same effect.

Discourage not (my Lords) such as love to be frugal, because they hope their Estate may remain with their Posterity: encourage not such as resolve to shake loose, by their Prodigality, what was establish'd by their wise Predecessors: By favouring the Creditors Defences, you will but gratifie the Prodigality of Heirs, or the laziness of Creditors;

Creditors; whereas, by sustaining my Clients pursute, you will secure us as to our own pactions, and as to your Decisions, you will perpetuat noble Families, and bound the Luxury of such as are to succeed.

The Lords sustain'd the Pursute, and repell'd the Defencess propon'd for the Creditors.

For the Lady *Carnegie* and her Lord, against the Lord *Cranburn*.

T H I R D P L E A D I N G.

Whether Tax'd-wards be lyable to Recognition.

My Lord Chancellor,

THe late Earl of *Dirletoun* having no Children, besides two Daughters, and having an Estate consisting of Lands in *Scotland* and *England*, did very judiciously at first resolve to marry one of them in *Scotland*, and the other in *England*; and in pursuance of this design, he bestowed *Elizabeth* the eldest, upon *William* Earl of *Lanerk*, Secretary of *Scotland*, Brother to Duke *Hamilton*, but which was more, a person admired for his Heroick Vertues, and whose Alliance was courted at any Rate, by the most eminent Families of both Kingdoms. The younger of these Daughters, named *Diana*, was matched thereafter to the Lord *Cranburn*; and as the

the Earl of *Lanerk* could not but have expected all, or at least the far greatest share of that Estate, So the Lord *Cranburn* could scarce have expected thereafter any thing above an ordinar Portion: Yet such is the capriciousness of old men, that the Earl of *Dirletoun* did, in anno 1649. by the impressions of some, who were inveterat Enemies to the Family of *Hamilton*, dispoñe the Lands of *Innerweek, Fenton, &c.* Failling Heirs-male of his own Body, to *James Cecil* his Grand-child, and the Heirs-male of his body.

His Majesty finding, that the said Estate was most illegally dispoñed to *James Cecil*, without his consent as Superior, they holding Ward of him, and that he had thereby defrauded the just Expectations of so worthy a person as the Earl of *Lanerk*, and so the Lands recogniz'd by the said Disposition, did gift the saids Lands to the Lord *Bargeny*, for the behove of the Earl of *Lanerk*; upon which Gift of Recognition, there is now a Declarator pursued by the Lady *Carnagie*, eldest Daughter to the said Earl of *Lanerk*, who thereafter became Duke of *Hamilton*, wherein she craves, that it may be declar'd by you, that she has the only Right of these Lands.

There are very many Defences propon'd for the Lord *Cranburn*, which I shall endeavour thus to satisfie.

The first is, Recognition has only place in *feudo recto & proprio*, whereas these Lands hold Taxed-ward, in which manner of Holding, all the Casualties are taxed to a very inconsiderable Sum, which Sum is designed to be the only Advantage that shall accress to the Superior: And the reason why Ward-lands recognize when they
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are sold without the Superiors consent, is, because the Superior having so great interest in the Lands which hold by simple Ward, as to have the Ward and Marriage of the Vassal, the Law did therefore oblige him not to alienat that Land, without the Superiors Consent; which reason ceaseth, where the Ward is taxed, the Superiors Interest becoming very inconsiderable by the Tax: nor can it be imagined, but that the Superior, having dispensed with the great Casualties of Ward and Marriage, has consequently dispensed with the said restraint, *Cui datur majus, datur minus, præsertim ubi minus inhaeret majori & est ejus accessorium.*

For satisfying which Difficulties, your Lordships will be pleased to consider, that our Law appoints all Ward-lands to recognize, if sold without the Superiors consent, and makes no distinction betwixt simple and taxed-ward; the general is founded upon expresse Law, and there is no expresse Warrant for excepting taxed-ward.

2. Seing these Lands could not have been sold before they were taxed, by what Warrant can they be sold since they were taxed? Seing though the Casualties of Ward and Marriage were taxed, and thereby these Casualties expressly remitted, except in so far as they are tax'd; yet there is no power granted to sell, without the Superiors consent: Nor is that privilege remitted by the Superiour, *Et Feudum alteratum in una qualitate, non intelligitur alteratum in aliis & actus agentium non operantur ultra concessa.* 3. The power of selling without the consent of the Superior, is different from the Casualties of Ward and Marriage, which are here only tax'd; for Feu-holdings

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are oft-times burdened with this restraint, and this restraint was of old, taken off expressly by warrands under the Quarter-Seal, without taxing the other Casualties; So that this privilege differs from these, and the one cannot be comprehended under the other.

The second Defence is, that by the Feudal-Law, Recognition *ob alienationem feudi est crimen, & delictum feudale*, against which error, *etiam probabilis ignorantia excusat*; as is clear, *lib. 2. tit. 31.* The words are, *Quod enim dicitur alinatione feudum aperiri domino, intelligendum est cum a scientibus alienatum est beneficium*, which are the words of the said Law: whereupon, *Socinus, reg. 153.* though he do give it as a Rule, that *Emphyteuta rem emphyteuticam vendens a jure suo regulariter cadit*, conform to the Civil-Law, *l. final. C. de jure emphyteutico*, he subjoyns these words, *Fallit ubi emphyteuta venderet ignorans rem esse emphyteuticam*; and accordingly, *Craig. de recognitione, lib. 3. diages. 3.* and in the case of disclamation, *lib. 3. diages. 5.* lays down for an undoubted Principle, that *ignorantia crassa excusat feudalialia delicta*. And here, the subject of the question is not *in jure*, & *in thesi*, whether Ward-lands should recognise; but *in facto*, & *hypothesi*, his Right being of the nature, and in the terms foresaid, he might dispone without hazard, as to which, an error in him, who was an illiterat man, was very excusable, especially having consulted *Peritiores*, and having been assur'd by very eminent Lawyers, that there was no hazard in disposing those Lands, without the Superiors consent, they holding Tax'd-ward, which was sufficient to have defended him, *in feudo amittendo*.

To which it is answered, that ignorance of the Law excuses no man ; and the case having been at best dubious, the Vassal should not have hazard-
 ed upon what the Law might construct to be a disowning of his Superior ; and since every man is obliged to know the nature of his own Feu, the Law doth presume, that every man doth know it, *Nam quod inesse debet, inesse presumitur* ; and therefore, Craig doth very well conclude, pag. 344. tit. de recognitione, that *Ignorantiam, pretendens vix audiendus est, cum sit crassa ignorantia, feudi sui conditionem ignorare* : and though he observes there, that *excusabitur, qui feudum suum non militare credidit, cum militare est* ; yet, that cannot be extended to this case, wherein the Vassal certainly knew, that his Feu held Ward : and though the Law sometimes doth excuse a Vassal, who had reason to doubt the condition of his own Feu, because of some mysterious Clause, or because he was a singular Successor, and had not recovered the Writs of the Feu, as to which he transgressed, or was necessitat to do the deed, for which he was challenged, by poverty, or such other occasions ; yet, that in the general, Ignorance did not excuse *delicta feudalia*, is very clear by the opinion of the learn'dst Feudalists, *Laur. Silu. de feud. recog. quest. 60. prepos. in cap. 1. §. prater ea de prohib. feud. alienat.* And in our Law, it was never found, that Ignorance did defend against Recognition, the falling of an Escheat, Disclamation, &c. And if the Superior were oblig'd to prove the Vassals knowledge, it were impossible ever he could prevail in any pursute ; Knowledge being a latent Act of the mind, which can never be proven but by Oath ; and to refer Knowledge
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to the oath of the Vassal, were not only to frustrate the Superior, but to tempt the Vassal to commit Perjury ; and albeit the Feudal Law did allow the Vassal to purge his Guilt, by deponing in some cases upon his design, yet that was only allow'd in cases where the external act was of its own nature indifferent, such as the speaking of contumelious words, that were to receive their genuine Interpretation from the design of the Speaker; and that did never take place in clear Acts, such as this is, wherein the Vassal hath sold his Feu, without the consent of the Superior.

The third Defence was, that where there is no contempt, there can be no recognition ; But so it is, that as the presumption of contempt is taken off by the constant tenor of the Earl of *Dirleton*'s respect for his Master, the King ; So the Disposition is given to be holden of the King, and that implys as much, as if it had been expressly provided, that the Alienation should be null, if the Superior should not consent and confirm the same ; and such an express Provision, should have certainly in the Opinion of all Feudalists, defended against Recognitions.

To this it is answered, first, That the Clause, *si Dominus meus consenserit*, doth not defend against Recognition, though exprest, *verbis geminatis, & pregnantibus* ; and unless it be resolutely conceived, bearing that it shall not be valid *alias, nec alio modo*, and although all these Cautions be adhibit, yet many Feudalists are clear, that this will not defend against Recognition, where the person to whom the Feu is disposed, attains to Possession, as *Cranburn* here did ; for they think, that in that case it is but *protestatio contraria facta*,

Et plus valet, quod agitur quam quod simulate concipitur : and if this were sustain'd to defend against Recognition, no Feu shall ever recognize, for the Vassal should still defraud his Superior of any advantage, by inserting a Clause *si dominus consenserit* ; upon which considerations, your Lordships Predecessors have, by a Decision the 16. of February 1631. found, that Lands may recognise notwithstanding of this condition. 2, The disposing of Lands to be holden of the Superior, is not equivalent to the Clause, *si Dominus consenserit* ; for the disposing Lands to be holden of the Superior, *provenit non ex facto Vassali, sed ex natura feudi, & ex stilo* ; all Feus being given in Scotland, to be holden either of the Superior or the Disposer, *à me, vel de me*, as shall best please the Receiver ; So that the disposing the Lands to be holden of the Superior, doth not shew any clear design the Vassal had to require the Superiors consent, and consequently cannot defend against Recognition.

To fortifie this point, it is urged by the Defender, that where there is no prejudice to the Superior, there can be no Recognition ; and there is no prejudice to the Superior in this case, seeing the Superiors prejudice is either upon the account, that the Vassal *redditur pauperior*, or that the disposing without the Superiors consent, obtruds upon the Superior a stranger, *ex aliena familia & inimica* ; whereas in this case, the Disposer was not *pauperior*, having reserved his own Life-rent, and in effect, the Fee it self, and power to burden the same, and contract Debt, and alter the Tailzie, and dispose of the Estate notwithstanding of the same ; and the Lord Cranburn cannot

not be said to be a stranger, being descended of the Earl himself, and being his Grand-child.

To this it is answered, that in Law, all such persons as are not *alioqui successuri, sunt extranei ex tenore investiturae*, and by two express Decisions related by P. Spotswood and Hope, it was found, that Dispositions made to the Brother or Grand-child did infer Recognition, though they were likewise *ex familia, Nec licet* (saith Craig, pag. 345.) *Vassalorum unum ex liberis suis eligere, sed vel natura, vel juris ordo sequendus, vel domini electioni res est permittenda.*

The fourth alledgeance was, that only *perfecta translatio domini*, can infer Recognition; whereas the Sasine here is null, because it is given to be holden of the Superior, and Sasines of that nature are intrinsically null, *quo ad omnes effectus*, except the Superior confirm the same.

To this it is answered, that *si vassalus fecit omne quod in se erat*, to alienate the Feu without the consent of the Superior, that alienation will infer Recognition, though the alienation was null otherwise, as is clear by Craig, pag. 344. *Quod si traditionem Vassalus fecerit, ea tamen sit invalida & nulla exempli causa si chartam dederit, de fundi alienatione tenendam de domino Superiore, quam Sasina sequatur. Et dominus Superior neque confirmaverit, neque ratam habuerit, videtur hanc alienationem nihil periculi secum trahere, cum conditionalis videatur & sub hac conditione contracta, si dominus ratam habuerit, aut confirmaverit, quæ conditio, cum non evenit & alienatio nulla sit ex defectu consensus Superioris, & paria sunt in jure omnino non fieri, & non jure fieri; sed profecto in hoc casu puto etiam feudum domino aperiri, nam quandocumque vassalus id omne fecit*

fecit & executus est, quod in se erat, licet factum illud de jure non teneat, tamen quatenus in se est, domini mutationem se velle testificatus est fidemque pregit : in hoc etiam casu a feudo cadet, licet alienatio nulla sit. Suitable to which, Baldus has very well observed, that licet alienatio sit nulla, ob vitium litigiosi feudum tamen sit caducum, quia in prohibitis non requiritur juris effectus, quod enim prohibitum est effectum sortiri nequit ; and if only effectual alienations could infer Recognition, it could never be inferred ; for all alienations to which the Superior doth not consent, are null, and by the Act of Parliament, 1633. all Sasines of Ward-lands granted to be holden Feu, are declar'd null, and yet are declar'd to be the ground of Recognition. And whereas it is alledged, that *Craig. Pag. 344.* relates the case betwixt *Mackenzie* and *Bain*, in which it was found, that Lands did not recognise, because not registrat within fourty days. It is answered, That there the Vassal non fecit omne quod in se erat, not having registrat the Sasine timeously, and so the Tradition was compleat ; nor did the person to whom it was disposed, possess in the case cited the Land disposed, as *Cranburn* did in this . and by the opinion of *Rosenthal*, capite. 9. conclus. 4. Feudum (inquit ille) absque domini consensu aperitur, etiamsi alienatio ex alia aliqua causa forte omissa solennitate legis aut statuti, aut simili, esset nulla modo possessio vera & actu tradita sit, nam doctores in hac materia considerant prejudicium ipsius domini magis in traditione rei quam in alienatione. Vide *Curtium, Jun. de feudis, pag. 5. num. 85.*

Whereas it is alledged, that the Sasine is null, as given upon a general Letter of Attorney out of the

the Chancellary, nor are general Mandats sufficient in *prejudicialibus*, and that this Safine was given to a Minor, who was extreamly lās'd. To both these, the former answers are oppon'd, wherein I have endeavour'd to prove, that the alienation may be null, and yet may infer Recognition; our Law considers not minority, as to casualities competent to the Superior, as is clear in the cases of Non-entry and Rebellion: and since the Act of the Disposer, is that which only infers Recognition, it imports not what the condition of the person was to whom it was granted.

It is also pretended, that the Safine is null, as being *actus legitimus qui non recipit diem, nec conditionem*, l. 77. ff. *de reg. juris*; for since *executione actus statim perficitur*, its inconsistent that *actus* should be *perfectus*, & *exequutus*, and yet should be suspended upon a condition, as this Safine is, which bears, *failing Heirs-male of the Earl of Dirletouns body*.

To this its answered, that this Safine cannot be call'd *actus legitimus*, that being ordinarily a term appropriat to Judicial Acts, whereas there is nothing more ordinar, then that Safines should be conditional, as we see in Safines given upon war-randice Lands, and in Safines following upon Wod-fets; nor is it denied that Safines may bear resolute conditions, and if so, why not other conditions, these being of all others most severe? Nor have any Lawyers written upon this Subject, who have not divided Safines in *puram* & *conditionatam*.

The fifth alledgeance was, that there can be no Recognition where the Vassal had power to dis-pone, and the Earl of Dirletoun had by his Char-

er, power to dispoſe ; for theſe Lands are diſpoſed in his Charter *heredibus & assignatis*, which implies *potestatem alienandi*, which the Defenders learn'd Advocats do found upon tit. 48, lib: 2. *Feud. Si quis enim ea lege alicui feudum dederit ut ipſe, & ſui heredes, & quibus dederint habeant qui ſic accepit poterit vendere, vel alienare ſine conſenſu Domini* ; for which likeways they cite *Craig, dicta. liag. 3: Clarus, Hottoman* and other Feudaliſts.

To this it is answered, that this general Clause *heredibus & assignatis*, is only meer Stile, and the word *assignatis* is uſed here improperly, as it is uſed in Bonds, in which a man binds himſelf, his heirs and Assignees, whereas it is impoſſible for a man to bind his Assignees. *Argumentum a ſtilo* is not ſtill probative, eſpecially in this Age, where Stiles are become too laxe, and in our eldeſt times there is a luxuriancy, which deſerves rather to be corrected, then allowed ; thus Inhibitions forbid us to alienate Moveables, and ſingle Eſtates give Right to Reverſions, albeit our Law reprobates out ſtile in both theſe ; and this Clause was not deſigned to import a Liberty to alienate, or elſe there could be no Recognitions ; ſeing all Charters bear that Clause, and ſuch as have that Clause, have oftentimes been found to reſign, & *generales clauſule non extenduntur ad ſpecificum* : and that by the Feudal Law, the word *assignatis* is not equivalent to *quibus dederit*, is clear ; ſeing the Feudaliſts uſe no ſuch term as *assignati* ; and in our Law *heredibus legitimis, & assignatis*, muſt not be interpreted as if it were equivalent to *quibus dederit*, but to that Clause uſed by Doctours, *quibus legitime dederit* ; and all Feudaliſts are poſitive, that the Clause *quibus le-*

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gitime

gitime dederit, implies necessarily that the Superiors consent is still necessar.

Likeas, *Generalis clauſula non extenditur ad prohibita, ubi fieri poteſt congrua interpretatio*; But ſo it is, that the word *Assignati* may be underſtood of Comprisers, or of ſuch to whom the Vaſſal ſhould diſpone the leſſer half of the Feu: So that when a Feu is granted *hereditibus, & assignatis*, it is lawful for Creditors to comprize that Feu, or for the Vaſſal to diſpone any part thereof, not extending to the half; but that Clause can never import, that it ſhould be lawful for him to diſpone the whole, without the Superiors conſent, that being an Interpretation which the Parties themſelves never deſigned; and Priviledges which are inherent in the nature of a Feu, (as this is) are never underſtood to be diſcharged, except where they are diſcharged expreſſly.

The Defender, my Lords, hath told you, that he propones all theſe Defences joyntly, which may diſcover to you, how frail his own Advocats judge theſe defences to be: Arguments which are being join'd, may by their mutual aſſiſtance that they can never aſtrict the Propoſers Right, no more than many Cyphers can make a Number, nor many uncertainties a certainty: This is a ſhift which Eloquence, not Law, has invented, and may prevail with Arbiters, but ſhould ſeldom convince Judges.

The Lords found that theſe Lands, though holding only *Taxt-ward*, did recognize; and repell'd alſo all the other Defences.

For

For *Alexander Carmichael*, against
the Town of *Aberbrothock*.

FOURTH PLEADING.

*How far the Borrower in commodato estimato, is
lyable, if the thing be lost, vi majore.*

When the Town of *Dundee* was so fortified,
that its Inhabitants had reason to expect
security to the Ships which lay under
their Walls, either by way of Defence, or capi-
tulation; the Town of *Arbroth* did crave the lend
of some Cannons from *Alexander Carmichael*; : but
because the said *Alexander*, as a Burgess in *Dundee*,
might have expected from the foresaid Garrison,
or from his being able to sail his armed Ship
where he pleas'd, perfect security to his Guns, he
therefore refused to lend the same, till the said
Patrick Wallace and other privat Burgesses of *Ar-
broth*, should estimat the Guns, and oblige them-
selves to re-deliver the said Guns free from all
skaith, Harm, or Danger, or else to pay the
sum of 500: *lib.* as the Price agreed upon: and
that in respect he foresaw, that the Guns were not
only lyable to great Danger, *ex sua natura*: but
likewise, because *Arbroth* was a naked Town, wan-
ting Walls, Men, and Skill; and albeit the Town
of *Arbroth* did owe to the said Guns, the Resistance
they made to *Cromwells* Ships in three several At-
taques, wherein if they had wanted Guns, their

Town had been burnt, yet so unjust are the saids Patrick Wallace, and others, that when the fore-said liquid Sum is charg'd for, they suspend upon this reason, viz. that this Contract is *commodatum*, & *commodatarius non præstat casus fortuitos*: But so it is, they subsume, that these Guns were lost *casu fortuito*, in so far as the Defenders endeavour'd to carry them to Dundee; but being beat in by Cromwells Ships, they were forc'd to bury them in Sands, out of which they were raised and taken by those Enemies.

To which it was Answered, that though in *commodato simplici*, *commodatarius non præstat casus fortuitos*, yet in *commodato estimato*, it is otherwise, which is most clear from l. 5. §. 3. ff. *commodato*, the words whereof are, *Et si forte res estimata data sit, omne periculum præstandum ab eo, qui estimationem se præstaturum receperit*; which holds not only in *commodato*, but in all other Contracts, where any thing is estimat, as is clear in the general, by l. 1. §. 1. ff. *de estimatoria*, *Estimatio autem periculum facit ejus qui suscepit, aut igitur rem ipsam in corruptam debet reddere, aut estimationem de qua convenit*: Many Instances of which general may be given in several Contracts, but it shall satisfy me to name *Dos estimata*, wherein it is very clear, that the valuing of things delivered, did oblige the receiver to re-deliver either the thing valu'd or its Price, though the thing valued did perish *casu fortuito*, as is clear, l. 10. ff. *de jure dot.* *Plerumque (inquit Ulpianus) interest viri res non esse estimatas, ideo ne periculum earum ad eum pertineat maxime si animalia in dotem acceperit, vel vestem quam mulier utitur, eveniet enim si estimata sint & mulier accipit ut nihilominus maritus earum est estimationem præstare*

præstet which is also most clear, l. 10. § 6. ff. *de jur. dot.*
 And if at any time the Law relax any thing of this
 alledged severity, in favours of him who receives
 the thing valued, it is upon the account that the
 thing valued, was delivered for the use and ad-
 vantage, not of him who received it, but of him
 by whom it was entrusted; as if in our case, my
 Clients had entreated the Citizens of *Arbroth* to
 receive their Guns, and had valued them at the
 delivery; the Law in that case, would not have
 burdened the receivers with the loss, where they
 gave no occasion to the Lend; but in the case
 where the thing valued was lent at the desire
 of the Citizens of *Arbroth*, and for their
 advantage, without any possible advantage
 for the Lenders, in that case, which is
 our present case, the Law doth in express
 words tye the receivers to re-deliver either the
 thing Lent, or the Estimation, l. 17. §. 1. ff. *de*
estimatoria; Si Margarita tibi estimata dedero ut
eadem mihi adferes, aut pretium eorum, deinde hac
perierint ante venditionem, cujus periculum sit? Et
ait Labeo quod & Pomponius scripsit, si quidem ego
te venditorem rogavi meum esse periculum, si tu me
tuum, si neuter nostrum sed duntaxat consensimus teneri
te hætenus ut dolum & culpam mihi præstes. Nor
 can this be well doubted, if we consider the nature
 of Estimation or Valuing, and the design of these
 who enter into such Contracts, by their Estimating
 the thing lent.

All Law-ers and others are of the opinion, that
commodatum becomes by Estimation, *anomalous &*
irregulare, and the Estimation were to no purpose
 if it did not bind the receiver of the lend to more
 than what would follow, *ex natura commodati sim-*
plicis;

plicis; and therefore, seing *commodatarius* was here lyable *ex culpa levissima* from the nature of the Contract, because the Lend was given only for the advantage of the Lender: It must necessarily be inferr'd, that the Receiver of a Lend that is valued and esteemed must be further lyable else there would be no difference betwixt a thing lent simply, and lent after it is valu'd, and consequently, the valuing before lending should operate nothing; so that seing in an ordinar Lend, the Receiver would be lyable in *culpam levissimam*, the Receiver must be lyable in *casus fortuitos*, where the thing lent is estimat before lending, there being no case *ultra culpam levissimam præter casus fortuitos*. 2. The Lender did secure himself by a Bond and the foresaid Obligation, to restore the Price, if the thing lent were not free of Skaith, Hurt or Damage. 3. If there was any thing ambiguous in this case, yet the clause behoved to be extended, *ad casus fortuitos*, and that must be thought to be the meaning of the Parties from the following rules, whereby ambiguous Contracts are to be interpret, *viz.* First, a Writ is always to be interpret against the Subscriber, who should impute to himself, that he did not clear what he intended, and it were unreasonable that his obscurity should be a snare to another person, *scriptura semper est interpretanda contra proferentem*. 2. That in reason should be constitute to be the meaning of the Writ, which if it had been treated of, had certainly been condescended to by all Parties: But so it is, that if at the time of the Lending of the said Guns, the Lender had refused to lend them upon any other terms, then that he should have been secured against

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gainst all events ; It is not to be imagined, that the Borrowers would have hazarded their Lives and Fortunes, and the honour both of their Country and Town, for the hazard of 500 Pound ; and it is as improbable, that the Lenders would have given the Guns, they being stated under all the Circumstances above-narrated. 3. It may appear both from the Circumstance of time, and the nature of the thing lent, that they foresaw the Risk these lent Guns were like to run ; for none but Idiots would not have foreseen the same: and it were against reason to think, that a man would secure himself against an open and seen hazard, especially being to lend them to persons who behoved to buy others, if they had not got the Lend of those, and who would have bought these Guns, if the Lender would have sold them, and if they had been sold, the Buyers had run all Risks.

To this it was Replyed, that first *commodatum estimatum* was only so called, when the Lender did estimat the thing lent, and did take the *commodatarius* only obliged to restore not the thing lent simply, but either the thing or value, at the option of the Receiver, as was clear, because the Receiver might have oppon'd Compensation against the Lender, when he was pursuing for the thing lent, or might make use of the thing lent he pleased, which was not our case ; because the Receivers of the Guns could not have retained the same, or have rejected Compensation against the Lender, though the Lend had been Damned. but it was in the option of the Lender to have call'd either for the Guns, or the Estimation, and this Estimation and Value was agreed upon, to the end, that the value might be repeated, if the

Guns were lost through Negligence, or Deterioration, but not if they were lost *vi majeure*, or *casu fortuito*. 2. By the expresse wor^s of the Bond the Value is only to be restored, in case the Guns be Damified, but there is no Provision made against their being lost, nor can that be presumed to be the meaning of the Parties, because *ille presumitur sensus verborum qui est rei gerendæ aptior*, and *casus fortuitus* is very contrary to the nature of *commodatum*. 3. This is not only *casus fortuitus*, but *insolitus*, to which no contract is ever extended, and this case, of the Cannons being taken out of the Sands, could never have been foreseen, seing it is absolutely extrinsick, both to the use of Cannons, and to the ordinar hazards of Cannons; and it was unusual and ominous for a Scots-man to provide against their being over-run by the Usurpers. 4. These Guns had been lost, if the Lender had retained them, seing the Usurpers, after the taking in of Dundee, made Prize of all their Ships and Guns.

To which it was Duplyed, that the former Law was oppon'd, bearing that the Receiver *commodati estimari* in general *suscipit omne periculum*, and that is properly *commodatum estimatum ubi intervenit taxatio pretii*: and though there may be such a *commodatum estimatum* as is mentioned in the Reply, yet, that *omne commodatum estimatum* is of that nature is denyed, and seing the answer is founded upon an expresse and general Law, it cannot be taken away but by a Law as expresse, clearing, that there is no *commodatum estimatum*, but in the case instanced in the Reply. Likeas the Interpreters, and particularly Faber, *ad h. l.* give Instances of *commodatum estimatum*, in the case where

where the thing estimat is to be restored, and *estimatio* in general produces that effect of transferring the hazard as will appear, *per l. 1. § 1. ff. de estimatoria*; by which it is likewise clear, that if the thing it self be not given back, the estimation must be delivered, and that the estimation extends not only *ad Deteriorationem, sed etiam ad Interitum*. Likeas in the general, *estimatio* is called a kind of Vendition, as is clear by *Calvin*, in his *Lexicon* upon that word, and the Citations there adduced; and in Venditions, the Receiver undergoeth all hazard, and therefore he should run the same hazard in *commodato estimato*. As to the second, It is Answered, that he who is obliged to deliver any thing free from all Hurt and Damage, is much more obliged to deliver back the thing it self, for it is probable, that he who guarded against the less Danger, would guard against the greater.

Whereas it is Alledged, that this must be the meaning of the Parties, the former rules are oppon'd, and it is added, that this case could never be called *casus infortuitus*, nor *fortuitus*, in respect that is *casus fortuitus*, which the skilfullest or Wisest Man could not foresee; but so it is, every Wise or Prudent Man might have, and could not but foresee this; and the *brocard rei gerenda aprior* is only extended to regular Contracts, but not to irregular Contracts as this is, wherein it is confessed, by both Parties, that they intended to transgress the ordinar rules and nature of *commodatum estimatum*, and to wrest the nature of this Contract to their particular case; and certainly, *sensu aprior rei gerenda* at that time was, that the *Deceptor*, who might have secured his own Gains.

and who was not obliged to lend them, did desire to secure himself against all hazards, when he caused estimate his Guns; else, why should he have caused estimate them? And to the third where it is alledged, that the raising of Guns out of Sand, is not the hazard which Guns ordinarily run; It is Answered, that the Burying and Sinking of Cannons is very ordinar; but it being foreseen in general, that these Guns might perish by the Usurpers, and in that Quarrel, that was sufficient, though every particular circumstance was not foreseen: for if the Guns had been stolen away by night, or had been taken in the Return, certainly the Receiver would have been liable; and yet that is not a more ordinar way of losing Guns, then this now instanced.

To the fourth, bearing, that those Cannons had been lost however; It is answered, that the Charger is not obliged to Debate, what hazard they would have run, he having secured himself by a Bond, as said is, and that might be as well alledged in Venditions, and yet none ever alledged, that the Buyer did not run all hazards of the thing bought, and was not obliged to pay the Price, because the Seller would have lost the thing sold, if it had remained with him; but the truth is, the Skipper, nor no Burgeess of Dundee wants any of those Guns which were aboard in their Ships at that time; and it is probable, that though the Ship and Goods had been taken from this Pursuer, he had none to blame but these Defenders who by Borrowing his Goods disabled him to venture to Sea with his Ship: nor can it be imagin'd, that the Burying of Goods in presence of the whole Town, and leaving their Carriages open

pen to the Usurpers, was exact diligence; nor did ever the Receivers, after the Guns were taken away, either inform the Chargers, that they might do diligence, or make application to the Usurpers for Restitution, as Dundee, St. Johnstown, Crail, and other Towns did; and wherein they prevail'd so, that these Defenders are not only lyable *ad casus fortuitos ex natura commodati estimati*, but for not doing exact diligence, *ex natura commodati proprii*.

The Lords found, that the Borrowers were not lyable to pay the Price, since the Cannons were lost casu fortuito, & vi majore.

For Sir Thomas Stuart of Gairntul-
lie, against Sir William
Stuart of Innernytie.

FIFTH PLEADING.

How Fury and Lucid Intervals may be proven.

THe deceast Sir William Stewart, finding his Daughter Jean fit enough to marry, did provide her to a Portion of twenty thousand Merks; in which, though he substitute William her Brother and others, yet yourships did, by a solemn Decision find, that she remained still in the Fee, & might have Disposed, withstanding of the quality of the Substitution, therefore you did sustain a Right and Assigna-

tion made by her in favours of Sir Thomas her Brother.

Sir William resolving rather to hazard the honour of his Family and Sister, then the loss of the Sum; did at last alledge, that the Assignation was not valid, seeing his said Sister was Furious, both before and after the granting of that Right: whereas Sir Thomas, in maintenance both of his Sisters honour, and of the Right made by her to him, d'd contend, that she had Dilucid Intervals, and at the time when the Disposition was granted, she was *sane mentis*; for proving of which, mutual Probation was allowed to both Parties, and the Testimonies having been Published, It is now alledged for Sir William, that albeit your Lordships had found that his Sister was in Fee, when the case was at first Debated, without relation to the Condition in which she was when she made the said Right; yet, though the Substitution was found by your Lordships not to be a sufficient ground to take from her the power of Disposing, it behoved at least to qualifie the said power, as that she should not be allowed to dispoise upon that Sum expressly against the Fathers Destination, except she were proven to be a person of an entirely sound judgment; and it behoved to be thought, that the Father perceiving the frailty of her Wit and Spirit, did only design she should have an Alimēt during her Life, but that after her Decease, the Sum provided should descend to the person substitute by himself. 2. Enriosity is a Disease which so disorders the Judgment, that those who labour under it are in Law accounted unfit to make Right, or to Adhibit any Consent; and Enri-

ing once proven, is still presumed to continue :
 So that it being proven that this Gentlewoman
 was once Furious, in so far as she tore her Cloathes,
 and did beat them who attended her, it must be
 presumed that this Fury did continue, except
 this were taken off by a most pregnant probation,
 wherein she could be proven not only to have
 done Acts of Folly, during the time that she was
 about the compleating of that Right, but that
 she had for a long time, both before and after,
 enjoyed not only *adumbratam quietem*, but an en-
 tire soundness of Judgment, neither tainted with,
 nor clouded by that Fury, which did formerly
 Incapacitat her to make the Right that is now
 quarrelled. For all Lawyers, and particularly
Zaccarius, do distinguish betwixt a Madness, which
 hath only *Remissionem*, *sed non Intermissionem*, where
 Simplicity continues when the Fury ceases, and
 that Fury which doth sometime totally recede :
 In the first of which they require, that the per-
 sons *quorum Furor est Intervallatus*, do not only
Actus Sapienti convenientes, *sed etiam Actus Sapien-*
tis, and that they shew not only a present Mad-
 ness, but that they testifie by a long Tract of con-
 tinued Recipiscence, a Sagacity, which proves
 that they are fully returned to the Vigour of their
 Judgment, and which is able to take on the pre-
 sumption which lyes against them, that *semel Fu-*
ribundus, semper Furibundus præsумitur. Whereas,
 in the Case here Contraverted, it's prov'd, that
 the said *Jean* was at best of a very weak Judgment,
 never able to Converse with others, nor to Admi-
 nistrat her own Affairs; and at the time she made
 the Disposition, there is nothing proven, which
 could have demonstrate her to have been in such

a Lucid Interval, as might have sustained the Act she was then doing, she having Discours'd to no man at that time, nor so much as read the Disposition, which no wise person would have omitted, and having contradicted her Fathers express Will, without gratifying any of her other Relations.

But before any distinct Answer can be return'd to the former Representation, your Lordships will be pleas'd to consider, that the two greatest Priviledges of Mankind are, that by Nature he is a Reasonable Creature, and that by Law he may freely Dispose upon what is his own; Whereas, this unnatural Brother, designs to rob his Sisters Memory of both these Allowances, and by denying her every thing that is fit for a Reasonable Creature, burdens himself to prove her a Brute. Somewhat is due to the Modesty of her Sex, more to the being Dead, (that great Sanctuary against all Malice) but most of all is due to the name of a Sister; and therefore, seing by how much the Danger is great, that may result from the probation, by so much the probation ought to be the more Concluding and Pregnant: It doth necessarily follow, that the probation to deduced in this Case, ought to be most Conclusive, seing it tends to take away the greatest Priviledges which were competent to the Defunct, either by Law or Nature. And albeit our Law allows not the Depositions of Witnesses, to prove in Cases exceeding one hundred Pounds; yet, by this method, Dispositions of the greatest Consequence may be enervat, upon the Depositions of Witnesses, and that just Law not only Disappoints but Cheated: and what Danger are we Expof

ts, when two fellows may, by their Assertions, prove us to be Mad, after our Death, and thereby Defame our Memories, and alter our Destinations? The Settlement whereof, is the most serious Earthly Satisfaction which we have in that last Agony.

It is very remarkable, that Law puts a difference betwixt Fatuity and Furiosity. Fatuous persons, whom we call Idiots, are these who want Spirit enough, *tardi, bardi, miriones, mac-carones, qui inopia caloris & spirituum laborant*: But Furious Persons are such, as have too much Heat and Spirit; and our Law hath placed a Distinction betwixt these two; for though neither Idiocy nor Furiosity can *regulariter* be proven, otherwise then by the Cognition of an Inquest up-Brieves rais'd out of the Chancellery, as is clear by Craig, and by the 66. Act. 8. P. J. 3. which Inquest must consist of fifteen Neighbours, who knew the person who is alledg'd to be Furious or Idiot, and who must call for that person before them, and examine her; so zealous our Law hath been for our honour, and so jealous of Witnesses. Yet sometimes it hath permitted open and notorious Fury to be proven after the death of the Furious Person, as in the Case Cited; but no Instance can be given, wherein Fatuity or Idiocy, was ever sustained to be proven after the Idiots death: which was most reasonable, for Idiocy consisting in the want of Wit and Judgment, which Habitude is not subject to the senses, but must be inferred by Conference and Consequences, therefore it should not be sustained upon the Depositions of Witnesses simply, but upon the Knowledge of an Inquest, who are in our Law

both

both Judges and Witnesses, and are in Quality and Prudence, above Witnesses. And if a Person can count their ten Fingers, they are not accounted Idiots, nor Fatuous; for, *Fatui sunt* (as *Zacheus* observes) *illi tantum qui omni ratiocinatione & Judicio carent.* So that this Gentlewoman cannot be proven to have been Fatuous, being now dead; but though she were alive, and that the probation led might be legally receiv'd, yet she cannot upon that probation, be said to be Fatuous, seeing it is proven, that she gave Money to buy Necessaries, that she came to Table, went to Church, Convers'd with Neighbours, and ask'd for her Friends at strangers who had seen them, and that she carry'd her self ordinarily as other Gentlewomen did, or ought to have done.

Lawyers sometimes speak of *Imbecillitas & Debilitas Judicii eorum quæ sensum aliquem habent, licet Diminutum*; and such are by all Lawyers allowed to Marry, and make Testaments, &c. as is observed by *Gomez. Resol. tom. 1. c. 6. Grass. in § Testam. quest. 21.* and thus it was decided, 27. Octob. 1627. in *Friezland*, as *Sand. lib. 2. Def. 2.* relates; and this at worst is our Case: for all that can be alledged against this Unfortunate Gentlewoman, is, that she was of a slow & dull Humour, as Melancholians are, these Hypochondriack Vapours being to their Spirits, what Storms are to the Sea, which though they Disturb them for a while, yet cannot they hinder them from returning fully to their former Calm.

Before I come to clear, that she was not Furious, your Lordships will be pleased to know, that *Furor* is defined to be *Dementia cum Feracitate & horrenda Actionum, vehementis Promissionis, & iniuriarum*

Furiosorum

Furiosorum, p. 6. In Law he is said, *omni intellectu carere*, l. 14. ff. de offici Presid. qui nec scire nec discernere potest, l. 9. ff. de acq. hered. qui caret effectu, l. 7. §. 9. quib. ex caus. in possess. qui caret omni iudicio, l. 12. §. 2. ff. de iudici. And because Prudence is *Qualitas quæ inesse debet*, ideo nemo presumitur *Furiosus*, sed potius *Sanae Mentis*; and two Witnesses, Deponing de *Sana Mente*, are preferred and believed more than a hundred who Depone upon *Fury*, *Mench. Lib. 6. Presump. 45.*

Lawyers divide *Fury*, in continuum, ubi animus continua mentis agitatione semper accenditur, & interpolatum, seu intervallatum, qui Dilucida habet Intervalla, quum Furor habet Indicias, & quæ Morbus non sine Laxamento aggreditur, l. 9. c. qui Test. facere Poss. & quos Furor stimulis suis variatis vicibus accendit, l. 6. C. de contr. empt. In whom *Fury* is but an *Ague*: *Madness* is but a Disease in the one, but it is the Temperament and the Complexion of the other; in the one the Judgment is but darken'd as by an Eclipse; but in the other, it lyes like the *Cimmerians* under a constant night. That this was not a continued *Fury*, is clearly proven; for the Depositions bear, that she was only Seiz'd with these fits that troubled her, twice or thrice in a year, and that at other times she had, non solum Remissionem, seu Adumbratam Quietem, sed etiam Intermissionem & Recipiscentiam integram, for they Depone at other times, she was as well as *Gentlewomen* are, or ought to be.

That which is contended then is only, that the *Lucid Intervals* are not clearly proven, at least it is not proven that she at the time of the Subscribing that Assignment, and for a considerable time

time before and after, was in a Lucid Interval; but the contrary will, I hope, appear from these Positions.

First, by the probation it will appear, that she was never Mad and Furious; for she at no time wanted all Sense and Judgment, albeit she was at sometimes oppress'd with an Overflowing and Abounding Melancholy, which Distemper differs clearly from Madness, as *Zachens* observes very well, *lib. 2. quest. 9. Melancholici* [saith he] *sunt timidi & inermes vel ridiculi; Furiosi vero in perpetuo motu audaces, ac precipites.* And it will appear from the probation, that she went to Table, to the Church, and to all Societies, which is not allowed to Mad People; that in her Fits, she did only laugh and sing: and when she did begin to talk idlie, the least sign would have made her recover her self, which is a clear sign of Melancholy, but no ways of Madness. And the Father, who best knew the condition of his own Daughter, was so far from thinking her Mad [as is pretended] that he left her a considerable Portion, which implies not only a Liberty, but an Invitation to Marry: Whereas, if he had thought her Mad, doubtless he had only left her an Aliment, but no Portion, and would have recommended, that she should not Marry; for what Father desires to have his Family Disgraced, by giving out a Mad Daughter? And the Physician also Depones, that she was only troubled with a Melancholy; which Humour; though when it boils over, will occasion great Distempers, yet, that stock of vapours being spent, the Brain returns, or rather continues, in its natural and exact Temper.

2. The Witnesses who Depone can give no such account of their *causa scientia*, as can infer Madness, for she being, as they confess, always removed to her Chamber; when her Distemper did shew its first Twilights, they could not exactly know that Habit of the Mind; that is necessar to be known in such Cases; Whereas, the *causa scientie* they give, is, that they heard her commonly repute Mad: And one Depones, that passing by her Chamber-door, he saw her laugh and sing, and heard her talk idly, which was too transient a way to know the nature of a Distemper, which the Law ordains to be known by Conference, and frequent Conversation.

3. Albeit in Law, *Semel Furiosus semper presumitur in Furore perstitisse*, yet when Lucid Intervals are once proven, as is very clearly proven here, *Quod adsumerat, potius presumitur in Dilucido Intervallo, quam in Furore gestum, si actus ita gestus fuerit, ut nullum Stultitie signum appareat*. This Mascard. gives for a rule, *conclus. 825.* and there he cites, *affli. decis. 143. Jason. ad l. furiosum, C. qui Testamentum facere possunt*; and *Covarr. de sponsal. parti. 2. cap. 2.* And thus the Roman Senat decided of old in *Testamento Tuditani*, cited by *Val. Max. lib. 7. cap. 8.* So that albeit where the Intervals are not proven, it is requisite, that *actus sapientis*, and the condition of the person before and after for a considerable time, be proven, to make the act appear to be wisely done; yet, where the Lucid Interval is proven, *actus sapienti conveniens*, for the precise time is sufficient, for else the proving prior Lucid Intervals should be unnecessary, seing though prior Lucid Intervals were not proven yet it would be sufficient, that the Act were *actus sapientis*,

sapientis, for that *per se* is exclusive of Madness.

4. The Nottar doth assert in the Assignment that at the time she was of a sound Judgment, upon which certainly he would have Depon'd, had he been alive, so that he is now a proving Witness: and *Froman. p. 81.* thinks the Nottars Assertion in such a case of great Moment. But above all, that which convinces me is, that Sir Thomas being interrogat upon his Oath, whether he believ'd she was then of a sound Judgment, doth Depone Affirmative, and though this be only an Oath of Calumny, yet it is equivalent to an Oath of Verity, nor do they differ; Nor could an Oath of Verity be more express, and so not more proving.

And whereas it is contended, that this Act was of its own nature, rather a sign of Madness, than of Prudence; seeing she did not read over the Assignations which she Subscrib'd, and seeing she oblig'd her self therein, not to Marry without her Fathers Consent, and that she therein altered that Destination made by her Father.

It is Answered, that at the time of her Subscribing that Paper, she desired that a Nottar might Subscribe for her, because she could not write; and when the Nottar told her, that she behoved to Subscribe her self, else the Paper would be null, she called for it then and Subscribed the same, which shew that she could reason and deduce Consequences, and that she desired earnestly to have her Brother Sir Thomas secure of what she did; and albeit Women can [because of their Sex and Employments] show but little Sagacity; yet in this she discovered *actus sapientis*, as well as *sapienti conveniens*. And albeit it be not proven, that

that the Paper was not read over, yet since the contrary is not proven, it must be presumed to have been done, *per argumentum & solitis*. And seeing Sir Thomas was the eldest Brother, & had entertained both her and her Mother, it was most reasonable that she should have left him her Estate, being the Stock of the Family; and she being bred up in a Kindness for him by their Mother, whose choice she was obliged to approve, being then in one Family with them, and her only Parent. And it was most just, that her eldest Brother coming in place of her Father, she should have taken his Advice in her Marriage: which Advice was not in Law binding, nor would she have fallen from the Right of her Provision, though she had refused his Advice; so that in this she honoured her Brother, and pleased her Mother, without prejudging her self.

Secure then [my Lords] in this Precedent, our Names against Infamy, and our Estates against the Lubricity of Witnesses, and Arbitrariness of Judges; and give not occasion to Witnesses in one Act, to perjure themselves, and ruine us and our posterity: And gratifie not the Avarice of a Brother, who digs up the Ashes of his Defunct Sister, to find that Sacrilegious Prey, which he hunts after: but let him see by your Sentence, as an Earliest of Gods just Judgment, what he deserves who calls his Brother a fool, much more, who for Money takes pains to prove his Sister such.

This Case was submitted to Lords, and the Sum was divided equally by them, as Arbiters.

For

For the Laird of *Miltoun*, against the
Lady Miltoun, Novem. 1669.

SIXTH PLEADING.

*In what Case a Sentence may be reduc'd, by a Repro-
 ator of the Depositions of the Witnesses whereupon the
 Sentence was founded, and by what Probation Sen-
 tences may be Rebrotated.*

I Tremble [My Lord] to think, that the
 Fortunes of the best of His Majesties Sub-
 jects, should be, by the Fatal Necessity of
 our Law, laid open to the Malice and Avarice of
 the meanest, and worst Witnesses: And though
 we know, there be thousands who would hazard
 their own Damnation, to satisfy either their Re-
 venge or Avarice; yet if any two of these Wit-
 nesses, should conspire to satisfy their Designs,
 either by Deponing that which is absolutely false,
 or by Concealing what is really true, to the
 Ruine of our Lives or Estates, it is pretended,
 that our Law hath invented no civil Remedy.
 This [my Lord] were to make the Law autho-
 rize the Robbing of Innocents, and to suffer no
 man to possess his Fortune, longer then two Ras-
 cals pleases; Wherefore, it is my Design, to Vin-
 dicat both our Law, and my own Client, and to
 show that your Lordships Justice is appointed as a
 City of Refuge, and that you can, by your Re-
 probators, defend us against their Depositions.
 But because this subject hath been but very unfre-
 quently

recently and darkly handled amongst us, albeit
 have in it very much both of Intricacy and Con-
 nement ; I hope your Lordships will allow me
 much more of time ; and seeing *ex facto jus ori-*
gitur, I shall, to the end the point of Law may be
 better understood, thus open to you the mat-
 ter of Fact.

The deceased Laird of *Miltoun*, did match him-
 self in a second Marriage to this Lady, to whom he
 did, with the greatest part of his Estate, give his
 chief House in Joynture; & after his Decease, she ha-
 ving married *John Maxwell* her present Husband,
 they did take as much pains to destroy the House,
 the Law obliges them to take in preserving it;
 which Abuses did put a Necessity upon Sir *John*
Whiteford my Client, to whom the Estate belongs,
 Son and Heir to the deceased *Miltoun*, to buy the
 said *Maxwells* Right, which he had to her Joyn-
 ture *jure mariti*; and after that her Husband and
 she had received a sufficient Price for it. they
 did enter upon an unworthy Design, of retaining
 both the Land and the Price; and in order there-
 to, it was Plotted, that the Husband *Maxwell*
 should go off the Countrey, and that this Lady his
 Wife should pursue a Divorce against him, as ha-
 ving committed Adultery; During the Depen-
 dence of which Process before the Commissars,
 pending, that the Reduction of this Right (which
 all in Consequence of the Reduction of the *jus*
mariti) was chiefly aim'd at, *Miltoun* offer'd to
 appear, and object against the Witnesses, who
 were led to prove the Husbands Adultery, and
 which Witnesses were persons known to be of ve-
 ritable and unsound Fame, and very lyable to all
 impressions; but he was not admitted, where-
 upon

upon he rais'd Reduction of the Commissars Decree before your Lordships, upon several reasons; two whereof were, 1. That the Lady had brib'd the Witnesses. 2. That she had suggested to them, what they should Depose, instructing them what Faces and Cloaths these Women had; which reasons your Lordships found not competent by way of Reduction, but by way of Reprobator.

When this Reprobator was, in Obedience to your Ordinance rais'd, it was alledged, that there could be no Reprobator now pursued, since it was not protested for, at the time when the Witnesses were led; but this was repell'd, both because your Lordships had reserved a Reprobator already, which was equivalent to a Protestation; and because the grounds of this Reprobator are but lately emergent, since the receiving of the Witnesses, and were not then known. And as *Durandus*, that learn'd Practitioner observes, *tit. de re prob. testium, num. 2. Quod si actor paratus sit jurare quod ad hoc, ex malitia non procedit, vel quod post publicationem, didicit id quod nunc objicit, tunc auditur sine protestatione*; and cites for this, *cap. presentium extra de test.*

The Lady finding her self in hazard to loss both her Joynture and Reputation by the event of this Pursuit, she now alledges, that these grounds of Reprobator are not relevant, nor receivable; 1. Because when Witnesses are sworn, they are purged of Partial Council, of the Receipt or Expectation of good Deed; so that this being *res habita* *non jurata*, it cannot be thereafter search'd into by him, who referr'd the same to Oath, & *detulit juramentum, nam dum detulit. transigit*. 2. Though

the Corrupter or Suggester may be punish'd *pena falsi*, yet the Sentence pronounced upon these Depositions, can never be reduced: 3. If this were allow'd, there should be no end of Pleas, *sed lites essent immortales*; for the first Witnesses might be reprobated by other Witnesses, and these by others, and these by others; & *sic daretur progressus in infinitum*. 4. Though corruption were receivable, yet it were only probable by the Oath of him who obtain'd the Decree.

Before I come to make particular answers to the difficulties proposed, I shall remember your Lordships in the general, that Probation being defined by Lawyers to be, *fidem facere Judici*, to convince the Judge of what is alledged, Probation by Witnesses is no infallible, but only a presumptive Probation; for it is founded upon no other warrant, then that it is presumable, that two dis-interested persons will not, by loosing of their own souls, gain any thing for a third Party; so that this kind of Probation seems rather to be introduc'd by necessity, then choice. And albeit at first, when the fear of a Deity did sway the World, and before men had absolutely lost their primitive innocence, and in place of it had learned those Cheats and Falshoods, which have grown up with time; that Probation seem'd to be very well founded, and two Witnesses were sufficient in all Cases: yet, Lawyers finding Infidelity daily to grow, have accordingly daily lessened their esteem of that proof; so that the civil Law did begin to require sometimes five, sometimes seven Witnesses: our old Predecessors establish'd Affizes of fifteen sworn Neighbours, who because they were both Judges and Witnesses, had liber-

ty to allow as much of the Depositions of Witnesses, as they thought fit; and thereafter, upon further experience, it is statute with us, that no Witnesses can be received in Cases above a hundred Pounds: and in *Holland, Italy*, and several other Countries, the Deposition of Witnesses cannot prove a crime, and are made no further use of, then to subject to the torture, the person against whom they are led.

Lawyers have likewise, as a further check upon these Depositions, even in these Cases when they are necessary, ordained ~~the~~ punishment of Perjury to be severe, *ob vindictam publicam*, and allow'd an Action of Reprobator for redressing of the Parties wrong'd, suitable to the two wrongs which Witnesses commit in their false Testimonies; in the one whereof they prejudice the Commonwealth by the example, and by the other, the private Party, in the Deposition it self.

Reprobator is by Lawyers defined to be, an action, whereby the Judge rescinds a former Sentence, because of the falseness of the Deposition, or because of the corruption of the Witnesses. And the Deposition of every Witness hath in it two parts, *viz. Initialia testimoniorum, & dicta testium*: *Initialia testimoniorum*, are, the previous circumstances premised by the Practique to the Depositions, whereof the chief are, Whether the Party be married? or what age they are? where they dwell? &c. which would be very impertinent Interrogators, if the Law did not intend to make use of these, as marks, whereby to try the faith and trust of the Deponers. These are likewise other Interrogators, which, though they be used as *Initialia*, yet certainly are *Essentialia* and

vable ; so that to deny him the liberty of causing the Judge purge the Witnesses, by their Oath, of any suspicion, were in effect to take from the Party his greatest security ; and sure, no person would desire that purgation, if he thought that he would be thereby cut off from the benefit of Reprobator. 2. If this were allow'd, it were easie to cut off all Reprobators ; for the leader of the Witnesses might still cause purge them, and oft-times the Judge doth it, *ex proprio motu* ; neither is it marked in the Deposition, whether the Witness is purg'd by the Judge at the desire of the Pursuer or Defender, but singly, that he being interrogat, depon'd, &c. So that in this case the person, against whom the Witnesses are led, should be prejudg'd without any act of his own. 3. Though a Witness have purg'd himself of partial counsel, yet if he depone falsly, he may be pursued by him, against whom he depon'd, for perjury ; *Ergo*, it is much more competent to the person, to pursue Reprobator in that case ; for Reprobator being but a civil Action, is far less dangerous. 4. *Juramentum purgationis* is not *juramentum decisivum*, and is taken, as Lawyers say, *non ad finalem decisionem, sed ad majorem cautelam*, and being introduc'd for the advantage of the Party against whom the Witness is led, it were most unjust that it should be detorted to his prejudice. 5. A Witness who purges himself of partial counsel, is but *unicus testis*, and depones upon his own innocence, and consequently doth not prove ; and it were most unjust, that he should in that case be better believ'd, then two famous Witnesses *omni exceptione majores*, and who depone upon his prevarication ; and if this privilege

ledge were given to an Oath of purgation, it would tempt men to lead debauched Witnesses, and them, when they are led, to depone arbitrarily, knowing that they can by their own Oath, clear themselves of any thing that might be objected against them, and that the Oath which they give, cannot only secure the party for whom they depone, but themselves against all hazard. And lastly, Lawyers who have treated very largely of this subject, have made no such distinction as this, but on the contrair, by doubting only, whether *disla testium* can be reprobat, because the Witnesses there are *contestes*, as said is; they clearly insinuat, that in all cases, where the Witnesses are not *contestes*, their Depositions may be reprobat.

To the second defence, wherein it is contended, that the effect of a Reprobator is not to reduce civilly the Sentence, *nam sententia semel lata pro veritate habetur*; but that the only effect of it would be, to punish the Parties Corrupters, or the Witnesses corrupted, by a criminal Sentence. To this it is answered, that the alledgeance is contrary to the grounds of all Law, and to the opinion of all Lawyers. 1. A Reprobator is in their opinion, *species revisionis*; as is clear by *Farin. Durandus, practica Ferarien.* and many others, and *Revisio*, in the dialect of Lawyers, is the same thing that Reduction is with us. 2. Seing Witnesses wrong both the Common-wealth by the example, and the privat Party by the Deposition, and since it is very just, that every wrong should have a suitable remedy, and seing the prejudice done by the example, is only remedied by the criminal Action: it is necessar, that the Party lesed should be assisted by a civil Reduction: and

it seems very unjust, that the Witnesſes ſhould be puniſh'd criminally, and that it ſhould be acknowledged, that the Party was wronged by the falſe Witneſſes, and that yet the loſs ſhould not be repair'd. 3. *Per l. 33. ff. de re judicata* (which I may call the Fundamental Law of Reprobators) It is clear, that both a civil and a criminal remedy are granted : the one, in theſe words, *rem ſe vere vindica*, and the other, in theſe words, *in integrum reſtitue*. The Law it ſelf runs thus, *Hadrianus editus per libellum à Julio tarentino, & judicante eo, falſis testimoniis, conſpiratione adverſariorum, teſtibus pecunia corruptis, religionem judicis circumventum eſſe, in integrum cauſam reſtituendam; in hac verba reſcripſit, exemplum libelli dati mihi à Julio tarentino, mitti tibi juſſi, tu, ſi tibi probaveris, conſpiratione adverſariorum, & teſtibus pecunia corruptis, oppreſſum ſe, & rem ſevere vindica; & ſi que à Judice, tam malo exemplo circumſcripto judicata ſunt, in integrum reſtitue*. Which is likewise confirm'd, *per l. ſi quis c. de adult. Et ita voluerunt Alexander, conſil. 148. & Lud. Bologn. conſil. 5.* And by our Practique, Sentences have been reduc'd, and the Party repon'd, when the Depoſitions whereupon the Sentence proceeded, were convell'd by a Reprobator : clear inſtances whereof are to be ſeen, the 23. of June, 1633. and 22. of December, 1635. And upon the 5. of March, 1624. in an Action of Reprobator rais'd againſt a Divorce, it was found, that the offering to corrupt one of the Witneſſes, was ſufficient to reduce the Decreet of Divorce : Whereas, here it is offer'd to be proven, that both the Witneſſes were corrupted, and if the Depoſition could not be quarreled in order to a civil effect, there

there needed no Reprobator at all ; for the Criminal Action of Perjury would reach the other effect, and the Lords of Session, before whom Reprobators are intended, would not be at all Judges competent. 4. This opinion, both of the Civil and of our Law, is founded upon very just Principles ; for the Sentence being in that case founded upon the Depositions, these being removed, the other should fall in consequence, *nam sublata causa, tollitur effectus* ; and therefore, Lawyers say, that *testes reprobati pro non testibus habentur*, Durand. *ibid.* and to allow a Decreet after Witnesses were reprobated, were in effect, to allow a Decreet without Probation. 5. When a Decreet is founded upon a Writ, if that Writ be found false, the Sentence is reduced ; as is clear by the whole Title, *Cod. Si falsis instrumentis*, &c. and therefore, much more should DECREETS be reduced, depending upon the Depositions of Witnesses which are reprobated, there being at least *eadem paritas rationis*.

As to the third difficulty proposed, which is, that this would *progredi in infinitum*, and there should be no end of Pleas, which objection is propon'd by *Abbas, ad cap. proposuisti de probat* : It is answered, that this Argument, if it prove any thing, will prove that no Perjury should be pursu'd, nor proven ; because, it is urg'd in this case, it may be urg'd there likewise, that these Witnesses who prove the Perjury, may be proven perjurd by others, and these by others ; and by the same argument also, we should have no Assises of Error, because, if a first Assise may be tryed for error, why not that Assise by another, &c. But this difficulty is easily sav'd, for Reprobators should

should not be sustain'd in all cases, and it is only *remedium extraordinarium ex nobili officio proveniens*, and should only be granted, when the reason of Reprobator is found most relevant, and is offered to be proven by Witnesses *omni exceptione majores*; and to deny it in that case, were great injustice. As for instance, if I should offer to prove, that albeit it were proven by two fellows, that I married *Bertha* in *Paris* such a day, whereas I offered me to prove, that the same day I pleaded before your Lordships in this House, and which were honour to all your number, were it not unjust to refuse to reduce a Sentence, which were founded upon that first Probation?

It is most groundlessly alledged in the last place, that though corruption of Witnesses were allowed to be reprobated, by an Action of Reprobator intended before a Decision in the principal Cause; yet no Reprobator could be pursu'd, after a Decree obtain'd in the principal Cause; for els no singular Successor could be secure, since his Right might still be reduced or reprobated by Witnesses, and so Sentences could be no sufficient Security to such as were assigned to them; as also, *post publicata testimonia & sententiam*, the loss of the Cause should still intent Reprobator, knowing what the Witnesses depon'd; at least the corruption of the Witnesses, should not be then probable any other way, then by the Oaths of the Corrupter himself. To which it is answered, that Reprobators are in Law allow'd, as well *post sententiam, quam durante primo processu*, as is clear by *Farinacius* and others; and there is no hazard of the publication of the Testimonies, because the question is not, whether the Testimonies & *dicta testimonium*

stium can be reprobated? for that is not here contended, but whether the *initialia* can be reprobated, which *initialia* use to be interrogat in presence of the Parties, and so there is no hazard of publication there: nor did ever any Lawyer alledge, that corruption was only probable by the Corrupters Oath, and this were most unreasonable, as will appear from these Arguments, 1. Corruption is *facti* and falleth under sense, and therefore is of its own nature probable by Witnesses. 2. Corruption could cast or set a Witness, before he were examined, and *eo Casu* would be probable by Witnesses, why not then after he has depon'd? for by our Law, as by the Civil, *noviter provenientia ad notitiam & emergentia*, are receivable and probable, *eodem modo & ordine*, as they ought to have been, if they had been sooner known; and seeing all objections against Witnesses, are only receivable with us, if they be presently proven, it were unjust not to admit emergent Objections or Proofs. 3. This were to make Witnesses most Licentious and Arbitrary, for the Parties may give, and the Witnesses take bribes, *sub spe impunitatis*, if they knew that they could not be found out, but by their own confession, and in effect this were to allow Perjury, and to invite men to it. 4. It is most presumable, that these who have brib'd, will perjure, and so their Oaths cannot be believ'd; and therefore, the Law must either declare, that corruption is no ground of Reprobator, els that it is probable by other Witnesses, and *media probandi*, then the Oaths of the Bribers, or bribed. It was never denied, but that a Decreet obtain'd by collusion of Advocats or Clerks, might be reduc'd, upon full probation of the collusion

by the Oaths of those Advocats or Clerks, else any of these by compearing, or omitting a Defence, might bind one hundred thousand Pounds upon any of the Lieges. and since it is confess, that the Civil Law and the Doctors do in this case allow probation by Witnesses, I see not why our Law should not admit it. They were as zealous for the Authority of Sentences, as we are, and Perjury is more frequent now than of old; and though our Law doth not allow probation by Witnesses, in cases above one hundred Pounds, yet that Law was only made to regulate the original probation of Debts in the first instance, but not the reprobating Sentences. And it were against reason & justice, that a Decree that was obtained upon the Depositions of Witnesses should not likewise be quarrelable upon the Depositions of other Witnesses proving corruption, these reprobating Witnesses being above exception, & such persons as the Judges may think fit to admit, whose choice will in this case, cut off the hazard of a *processus in infinitum*: Seing it is not probable, that Judges will allow any such persons, as may endanger the interest of him against whom they are led, this power can be no where more securely depositat, then in his Illustrious Senat, whose frailty is much less to be jealous'd, then is that of Witnesses; and though the constitution of a Debt cannot be prov'd by Witnesses, where there is no other probation; yet it follows not, that a Decree founded upon a matter of fact, & upon the Depositions of Witnesses, may not be taken away or reprobated by other Witnesses: for, though where Debt is lawfully constitute, it cannot be taken away by Witnesses, yet the case here contraverted is, whether the Debt was lawfully

ly constitute? and the alledgeances are corruption, *alibi* and other matters of Fact; & though a Decreet has interveen'd, yet that doth not so alter the nature of the thing, as to make it leave to be a matter of Fact, and the Defences emergent, since the Decreet and matters of Fact are still probable by Witnesses.

It is unjust, that what was first purchased by Witnesses, should not be tryed by the Depositions of Witnesses, *Eum debet sequi incommodum, quem sequitur commodum; & nihil est tam naturale, quam unumquodque eodem modo resolveri, quo colligatum est.* And as when I pursue upon a false Bond, the falshood of that Bond is to be tryed by Witnesses, our Law doth not force the Defender to refer the truth of the Debt, or of the matters of Fact, to the Oath of the Pursuer: Even so, when a man is pursued upon a Decreet, which is obtain'd upon false grounds or Corruption, why should our Law force me to refer the truth to the Pursuers Oath?

Sure, if ever Reprobator was granted, it ought to be in this case; wherein my Client offers to prove, that this Lady (whose Sex I am loth to wrong in her person) did bribe these Witnesses, and instructed them *verbatim* what they should depone; this is offered to be proven, not only by their own confession, but by the Deposition of many, who are more numerous, and more famous, though their own confession proves them to be vacillant and faithless Rascalls, and who though they should not be believ'd in any case, yet ought to be believ'd as well in this retraction, as in their first Deposition, and who can enervat, though they cannot abstract, their own testimonies, and this probation ought to be received, against the Deposition of two Villains, who stand condemned by
common

common fame, which is sufficient to hinder them from being Witnesses *omni exceptione majores*, and are condemned by the Kirk-session for keeping Bawdy-houses, wherein they have shak'd off that fear of God, which is the ground of the Faith we give to Witnesses, and have learned by pimping persons, to pimp Pleas. I am here in defence of a Marriage, *quæ est causa maxime favorabilis*, and the dissolution whereof requires a probation *de testes omni exceptione majores*; and it is very probable, that a woman who is so impatient in those holy Bands, and so malicious against her own Husband, as to asperse him with every thing that may lessen his reputation with your Lordships, would not spare to have dealt so with the Witnesses, as might best effectuat her designs, knowing that if she prevail'd not, she behoved to return to the Society of a Husband, whom she had so highly disobliged, to miss the enjoyment of that Jointure, which she so ardently expected; and to be justly branded, for having so maliciously and causelessly defam'd so sacred a Relation.

The Lords sustain'd the reasons of Reprobator to be proven by Witnesses, omni exceptione majores.

For

For the Lord *Balmerinock*, against the
Lady *Coupar*, Feb. 1670.

SEVENTH PLEADING.

How far a Disposition, made by a man, in favours of his Lady, of his whole Estate, is reduceable, as done in lecto ægritudinis.

MY Clients (My Lord Chancellor) this day, are not the Lord *Balmerinock* only, but all such as either may be Heirs, or Husbands; And by how much greater their Estates are. by so much the more they are concern'd in this discourse: wherein I design to assist them when they are upon Death-bed, which is an occasion, at which not only their wit and memory leave them, but wherein they are oft deserted by all other Friends, besides these who design to prey upon them. And I am so zealous in this service, that I cannot detain my self any longer, from opening to you the matter of fact in this Cause, which may be saved by its very merits, if ever any was.

The case (my Lord) stands thus, The late Lord *Coupar* had, by his Fathers kindness, and out of the Estate of the Family, a considerable Fortune bestowed upon him, and what addition it has receiv'd since, is rather the product of so considerable a stock, then of that Lords industry: so that he having died without Heirs, this Estate should have return'd to the Family, not only by a
legal

legal succession, but by the rules of gratitude. Yet having in a second Marriage, at the Age of three-score and ten, married a Lady, by whom he got no great Fortune, she induc'd him to dispoſe his whole Estate, Honours and Title in her favours, and in favours of the Children to be procreat betwixt her and any other Husband (the first bribe was ever given by a dying Husband, to invite a Wife to a second Marriage, and though a Brother may raise up seed, yet we never hear, that a Woman rais'd up seed to her Husband) of which Disposition, there is a Reduction rais'd by the Lord *Balmorinch*, who is Nephew to the Defunct, and should have been his Heir, wherein he quarrels this Disposition, as made upon Death-bed by the Lord *Coupar*, after contracting of that sickness, whereof he died, and as done in prejudice of him as appearand Heir.

My Lord, I know, that *Legis est jubere, non suadere*, and that *omnium quæ fecerunt majores nostri, non est reddenda ratio*; yet, this Law, or rather ancient custom, whereby persons upon Death-bed can do nothing in prejudice of their Heirs, can justify it self equally well, by Reason and Authority.

The reasons inductive of this excellent Law, are first, That after Men are sick, their Judgements grow frail with their Bodies; and the soul of man wants not only then, the pure ministry of well-disposed Organs, but as likewise disordered by the infection of the languishing body; wherefore the Law observes, *lib. 2. Reg. Maj. cap. 18. verse 9: Quod si quis in infirmitate positus, quasi ad mortem, terram suam distribuere ceperit, quod in sanitate facere noluit, præsumitur hoc fecisse ex fervore animi poti-*

us, quam ex mentis deliberatione. Which presumption seems to be very well founded; for it is not imaginable, that any man who is reasonable, would pull down his own house; and Nature and Reason being the same thing varied under different expressions, he who overturns the one, cannot be found in the other. The second reason is, because men ordinarily upon Death-bed, being surpris'd with the approach of death, and terrified with the prospect of what follows it, do so little value the affairs of this world, which they begin now to find so little able to repay their criminal pains and love, that to evite the importunity of such assistants, as are like vultures busie about the Carrion upon such occasions, they are content to ransom time and quiet, with the careless loss of their Estate; and who would not buy time then at a dear rate? So that this Law is the great fence of our Sick-bed, as well as of our infirm judgments. The third reason is, the great respect our Law bears to antient and Noble Families, who are the Corner-stones of the Kingdom, to whose Valour, our Law has oft ow'd its protection, and so could not refuse its to them. And sure, if either the importunity of Mothers, for their younger Children, or of Wives for themselves, could be successful, the Heirs would succeed to a heavy and empty Title: and upon this consideration, the Parliament did lately refuse to allow Parents the power of providing their younger Children to small Portions, upon Death-bed. I know also, that some add, as an original reason for this Law, the avarice of Monks, and Church-men, vvho persvaded men to Wodset for themselves rooms in Heaven, vvith great Donatives to pious uses, to restrain

strain which excess, *Venice* and other Kingdoms
 have taxt the value of what can be so bestow'd.
 And albeit the restriction imposed by this Law,
 may seem destructive of *Dominium*, which is *jus*
disponendi, and that by the Law of the 12. Table,
Us rei suæ quisque legasset ita jus esset; So that this
 seems to want all foundation either in common,
 feudal, or the Laws of other Nations. Yet, if we
 examine, we will find *Dominium* is in very many
 moe cases than this, and in more favourable, re-
 stricted by all Laws; and that *querela inofficiosi Te-*
stamenti, is founded upon the same reason with this
 Law; and that by the Laws of *Spain* and *Flanders*,
 (so great is the favour of Noble Families) Noble-
 men cannot at any time Dispose their Estates, but
 must transmit to their Posterity, what ever Lands
 they got from their Predecessors. But though no
 Nation joined with us in this Law, this should ra-
 ther induce us to maintain it, as being truly a
 Scots Law; and we must be so charitable to our
 Predecessors, as to believe, that they would not
 without very cogent motives, have restricted their
 own power of disposing, and have receded from
 the custom of all other Nations; and we should
 be as carefull of our fundamental Laws, as the
 Spaniards are of their private Estates. And of
 all persons, against whose importunity the Law
 should guard us, sure our Wives are the chief, for
 they have the nearest, and frequentest accesses,
 the most prevailing charms and arguments, and of
 all creatures Women are most importunate, and
 are most dangerous when disobliged; wherefore
 the Law hath wisely forbidden all Donations be-
 twixt Man and Wife, fearing in this, mutual love
 and hatred, though in modesty, it hath only ex-
 press

prest the first. And sure if this Donation should subsist, every Woman would think her self affronted, as well as impoverish'd, if she could not elicit a Disposition from her Husband, of some part of his Estate. And to what condition should a poor Man be reduc'd, and with what inconveniences urg'd, when he behov'd either to disoblige his Wife, or ruine his Heir, and to load his Fame or his Estate. So that the Lord *Coupar* hath in this, prejudg'd Husbands and Heirs, and hath violated *¶ jus Parentale, & Maritale.*

It is alledged for the Lady, that the reason is not relevantly libelled, seing we do not condescend upon a form'd disease, under which the Lord *Coupar* laboured the time of the Disposition, and of which disease he thereafter died: Nor is tenderness and infirmity sufficient of it self, to maintain this Reason of Reduction, especially in Old Men, whose Age is a continual infirmity, and yet is not by Lawyers called a sickness, sickness being a preter-natural, whereas age is a natural infirmity. And this Law being mainly founded upon the presumption, that these who are upon Death-bed, have their Judgements and Momories so clouded, and disordered by the sickness which presseth them, that they are either altogether disabled from doing Affairs, or at least from doing them judiciously, and according to the rules of reason: therefore such a disease should be condescended on, as influences the Judgement, and incapacitats the Disposer to understand his own Affairs. Whereas it were absurd that Old Men who keep the House, should be generally interdicted, meerly because they come not abroad, and are somewhat tender, albeit they be otherwise very ripe

ripe and mature in their Judgement, as ordinarily Old Men are, Nature having bestowed Prudence upon them, in exchange of that bodily vigour, which remains with those vvho are Younger: and it were unreasonable, that if any Person were a little tender, and had not occasion thereafter to come abroad, that a Disposition made by him should *ex eo capite* be reduced, albeit it cannot be qualified that he died of that disease. Wherefore our Law having restricted the power of Heretors so far, that as they cannot dispoⁿe their Estate upon Death-bed, in prejudice of their Heirs, it hath most justly appointed, that the disease wherewith they are infected should be condescended upon; to the end it may be known, whether it could influence the Judgement or not, or whether or not the Disposer died of that disease: and in all the decisions which concern cases of this nature, it is remarkable, that the disease is still condescended upon. Likeas, by the 18. cap: lib. 2. Reg. Maj. The reason whereupon this Law is founded, is said to be, *quia tunc posset in modico contingenti ejus hereditatem distribuere, si hoc permetteretur, ei qui fervore passionis instantis, & memoriam, & rationem amittit.*

To which it is reply'd, that it is libel'd in the reason of Reduction, that the Lord Coupar Disposer had contracted a sickness, before he had granted the Disposition, which is all as necessar; And it were most absurd, to think that the Pursuer should be necessitat to condescend upon a particular disease, and design it by a Name: For this were to make two Physicians absolutely necessar in all diseases, since none are presumed to know the Names and Natures of Diseases but they; and there

there is sometimes such a complication of Diseases, and new Diseases do so often creep in amongst mankind: that hardly even a Physician can design them exactly by a particular Name. And it is very observable, that when the Name of a Disease is condescended upon in any Decisions, it is not by the Pursuer, but by the Defender, who condescends upon the same, for clearing either that the Disease was not Mortal, or that it did not affect the Brains. But yet when we consider these Decisions, we will find, that if the Person had been proven to have been once sick, the Disposition is still reduced, though the Disease be not proven to be such as could affect the Brain. Thus a Disposition was reduced, albeit it was offered to be proven, that the Disposer was *mentis compos*, February, 1622. Robertson against Fleeming, and that he did his Affairs. and sat at Table as at other times: nor is it requisit the disease be *morbis fonticus*, pen. July, 1635: and 7. July, 1629. The alledgeance of *judicii minime vacillantis* was also repell'd, and a provision was not sustain'd made to a Child, though the Father had only a Palsie in his Arm, and liv'd 28. Months, July, 1627. And this is most reasonable, because the soundness of the Judgment being that which is not subjected to the Senses of Witnesses, they cannot properly cognosce thereupon, and they would in that case be rather Judges, than Witnesses. For if it were otherwise, Servants who are the only ordinar Witnesses that are present, would have it left arbitrary to them, to make the Disposition valid or not, as they thought fit, and they might depone very boldly, because without hazard, since in such guesings as these, they might assume to themselves a very great

great liberty ; and thus though the Law thought it fit, not to put in the power of the Heretor, to prejudge his Heir upon Death-bed, by Dispositions, your Lordships should by your Decision, put it in the power of Servants to prejudge them, by their Depositions. And if it were necessary to prove, that their Judgement was disordered by the sickness, then this Law had been absolutely unnecessary, for whatever Disposition is made by any person, whatever condition he be in as to health, yet if he be not *sana mentis*, it is still reduceable; and as unsoundness of Judgement without sickness in that case, were sufficient, so the Law hath made sickness without unsoundness of Judgement, to be sufficient in this. For, to the end there might be nothing arbitrary in this case, where the greatest of the Subjects (such as are the Nobility) are concerned in their greatest interest, which is the Disposition of their old Heretage ; The Law hath appointed, that if the person be once sick who dispon'd, the proving that sickness without any thing els, shall be sufficient for reducing that deed, except it can be proven, that the person who granted the Disposition went thereafter to Kirk and Mercat ; to which none go, till they be intirely recovered, and fit for business, these being places, wherein sound men are still presumed to be serious, because these places are not fit for recreation, and so not fit for such as are sick, and which are acts that falls under sense, and so may be deponed upon by Witnesses, and are acts exposed to the view of very many : and the Heir cannot be thereby prejudged, by either the want of Witnesses, or by being tyed to the deposition of domestick, packed Witnesses ; for such only are usually admitted

mitted to visit the Defunct (and so are the only persons who can be Witnesses) by these, who had him so much in their power, as to elicit such Dispositions from him.

The Defender (my Lord) finding her self straitned by this debate, joyns, to her former Defence, another, which is, that going to *Kirk and Mercat* are not absolutely necessar qualifications of health, but it is sufficient if the Defunct might have gone to either of these, or did equivalent deeds, whereby it might have been known that he had recovered his health, for that is the scope and design why the others are condescended upon: and it were unreasonable, that the going down a stair within Burgh, and the buying of an Apple at a Crame, should be a greater sign of health, than the riding of a Journey: so that going to *Kirk and Mercat* may be supplied by equivalent acts; And the Lord *Comar* did equivalent acts, for evidencing that he was in health, at, and after the granting of the Disposition, in so far as he rose from, and did go to his Bed at his ordinar times, did come to Table, entertain Strangers, wait upon them without doors to their Horses, sell his Corns, take in his Accounts, and writ long Letters all with his own Hand, in which Letters, he shew a former design he had to make that Disposition. Likeas, former Letters can be produced long prior to his sickness, wherein he shew'd his design; whereas your Lordships have by former Decisions found, that equipolent acts were sufficient, as in the case betwixt *Sym* and *Grahame*, in anno, 1647. Wherein it was found, that the writing of the Dispositions a sheet and a half of Paper, all with the Disponers own hand, was sufficient to sustain the

the same, and to defend against the reason of Reduction upon Death-bed: and in February, 1668. in the action *Pargillis* against *Pargillis*, it was found, that the riding on Horse-back, though the Disposer was proven to be sick, and that he was supported upon his Horse, were sufficient qualifications of health; And if the going to Kirk and Mercat were still requisit, the *Lieges* could never be *intuto* when a Disposition is made to them, seeing very many men, who are in perfect health, do oft die suddenly, before they have occasion to go to Kirk and Mercat, and when the persons to whom the Dispositions are made, cannot suspect there is any need of their going there.

But though Kirk and Mercat were requisit, yet it can be proven that the Lord *Campar* went to both; and albeit he was supported, yet that was only in a piece of the way, which was rough, and at which he used to be supported at other times, when he was in health, and was therein supported now, not because of the sickness, but because of the way.

To which is replied, 1. That the Law and continual Decisions having fixt upon the Kirk and Mercat, as *indicia Sanitatis*, no other acts can be sustain'd as equivalent; for, where the Law requires solemnities, such as these are, *solemnia non possunt per equipolentia adimplere*; thus earth and stone being required as symbolles in Seafins, three Oyeises at Mercat-croces, &c. Acts equipolent to these would not be sustain'd; & the Law having appointed that a Child should be heard cry, to the end Marriage may not be dissolved, though the Woman die within year and day, the Law sustains not that the Child was a lively Child, or might have cryed: for, saith that Law, it was fit that
some

some certain sign should be fix'd upon, to prevent the arbitrariness of Witnesses : And seeing it would not be sustain'd to elide the reply of Kirk and Mercat, and the alledgeance of health founded thereupon, that the Defunct was not in health, though he went not to Kirk & Mercat; so the reason of Reduction founded upon sickness, because he went to Kirk and Mercat, ought not to be elided, by alledging that the Defender was in health, though he went not to Kirk or Mercat; and if equivalent acts were sustain'd, this Law might be easily elided, and the effect of it would become altogether arbitrary. 2. The acts condescended on, are not equivalent signs of health, to the going to Kirk and Mercat; 1. Because these acts of going to Kirk and Mercat, are fixt upon by a long tract of Decisions, and so are *solemnia jure recepta*; but these other acts are not such as have been found equivalent by any former Decision : but on the contrair, acts of more adjusted equipolency than these, have been repelled, when propon'd to take off the reason of Death-bed; and thus in the foresaid Decision, *February, 1. 1622.* It was alledg'd that the Disponer was able to go to Kirk and Mercat, and that he went about his Affairs within doors, and came to his own Table, as formerly. And though it was alledg'd upon the *penult. June, 1635.* that the granter of that Disposition then quarrell'd, and which was made upon most deliberat grounds, was able to manage his own affairs as formerly, having only a Palsie in one arm, which did not affect the Judgement. And the *1. July, 1637.* It was alledg'd, that the Disponer who had granted a Bond of provision to his own Son, had no disease which could be *impedimentum*

dimentum rebus agendis, and that he lived 28 months thereafter, and went about his Affairs, yet all these condescensions upon health were repelled, though the time of surviving were much longer there than here, the case of the granting of the Disposition much more favourable (and indeed, none can be less than this Defenders case) and the persons who did dispoise, of a much greater consistency both of health and spirit, then the Lord *Coupar*, who was known to have needed little sickness, and much less importunity and design, was used in this case, to make him do acts both irregular, and unwarrantable.

As to the Decision, *Sym* against *Grahame*, It is answered, that it was proven there, that the Defunct went upon his own feet to the Apothecaries Shop, and to his Physicians House, which implies necessarily in *Edinburgh*, a going thorow the Mercat, whereby the Law is satisfied, and a publick act was done, which might be proven by unsuspect Witnesses. And as to *Pargillis* case, the Disposition there, was made in favours of a Grand-child, with whose Mother the Grand-father had promised the Estate at the contracting of the Marriage, he having been Party-contractor for her, though that promise was not insert in the Contract; likeas, the Disposer went to the ground of the Lands unsupported, and gave the Seisin himself: and albeit he rode to the Mercat, because he was Goutish, which was the only disease that was proven, and which is in the opinion of the Physitians, rather a Pain, than a Disease; yet he went to the Mercat unsupported from his Lodging.

3. All these acts condescended on were done at several times, and might have been very easily done

done singly, by a person who was sick, and none of them are such acts as require health both of body and mind, as doth the going to Kirk or Mercat, nor did they require the coming abroad to open air, which is the severe tryal of health; and all these acts were transacted *intra privatos parietes*, and so subject to suggestion, and collusion, the Witnesses being such as were under the power of the Defender, who did elicit the Disposition, and the appearand Heir being absent, and very remote, as is ordinar in such cases: whereas the going to Kirk and Mercat, are acts wherein the appearand Heir may hear a conjunct probation, and wherein though the Witnesses to be led for the Defender, design to prevaricat, yet the fear of being control'd by a multitude, would hinder them to adventure upon the deponing an untruth.

4. All the acts condescended on seem to be done *ex affectata diligentia*, & *affectata diligentia pro negligentia habetur*, nor can any acts be esteemed equivalent, except they were such, as clearly evidence, that if he had design'd to have gone to Kirk and Mercat, he could have done the same; whereas in this case, when the Defunct design'd to go to Kirk or Mercat unsupported, as Law requires. he could not perform the same, but behoved to be supported as said is, by which it clearly appears, he did not any acts that were equipolent.

To his actual going abroad to the Kirk or Mercat, I make no answer, since our Law requires his going unsupported, which cannot be alledged in this case; for as going to Kirk and Mercat, is an exception which takes off the reason of Death-

bed, so the being supported elides the exception of going to Kirk and Mercat. And so unfavourable have their Reductions alwayes been in our Law that the Pursuer offering to prove supported, is preferred to the Defender, who offers to prove unsupported, as was found, 27. July, 1629. albeit *regulariter* the Defender is preferred to prove his own defence; nor needs the Pursuer debate from what cause the supportation proceeded, for it cannot be known to Witnesses upon what account he was supported, and that might have proceeded from infirmity, as well as from the ruggedness of the way: and so this Law would in its execution and application, return still to be arbitrary. Witnesses or Judges might guess at the occasion of the supportation. But without debate, the Pursuer contends that this priviledge of eliding a Reduction *ex capite lesii*, being only competent to the going to Kirk and Mercat unsupported; he who is supported, gains not the priviledge, because he fulfills not all the qualities, and it is very well known, that the way is ordinary Calsay, and that the House and Mercat are not distant three pails, and the Lord *Coupar* used ordinarily to walk there unsupported; So that when he took support, especially at a time when he designed so much to go unsupported, it shews convincingly, that his infirmity, though not himself, remained still disobedient to all their designs. and though they could force him to dispoise, yet they could not force him to be found; and your Lordships may easily judge, that these who were at so much pain to make this Disposition subsist, were not wanting to use all endeavours for carrying him over this last difficulty, so that this support proceeded not from

from chance, but from necessity.

Seeing then your Lordships have been so rigid-
 observers of the Law, in prejudice of poor Chil-
 dren, and poor Relicts, who were unprovided, I
 hope you will not prostitute it in favours of a stran-
 ger who had formerly gotten all the Defuncts E-
 state in Jointure: Reward not thus the importuni-
 ty of Wives, and bribe not avaritious persons to
 trouble us at a time, when we shall think all time
 too short, to be imployed in the service of Him,
 whom we have so much, and so often offended:
 and take not from us in one Decision, the prote-
 ction of the Law, when our Judgements are frail,
 the quiet of our Souls when we are sick, and the
 ease of our Successors when we are dead.

The Lords reduc'd the Disposition.

for the Countess of Forth, &c. a-
 gainst E. C.

EIGHTH PLEADING.

*How far Restitutions by way of Justice, are prejudged
 by acts of Indemnity,*

Might stand in the next degree of guilt, to
 those who forfeited the Earl of *Bramford*, if
 I thought that his Merit, or your Lordships
 Loyalty needed, that I should urge much the
 favour of his case: He was a person who carried
 the

bed, so the being supported elides the exception of going to Kirk and Mercat. And so unfavourable have their Reductions alwayes been in our Law, that the Pursuer offering to prove supported, is preferred to the Defender, who offers to prove unsupported, as was found, 27. July, 1629. albeit *regulariter* the Defender is preferred to prove his own defence; nor needs the Pursuer debate from what cause the supportation proceeded, for it cannot be known to Witnesses upon what account he was supported, and that might have proceeded from infirmity, as well as from the ruggedness of the way: and so this Law would in its execution and application, return still to be arbitrary. If Witnesses or Judges might guess at the occasion of the supportation. But without debate, the Pursuer contends that this priviledge of eliding a Reduction *ex capite lesii*, being only competent to the going to Kirk and Mercat unsupported; he who is supported, gains not the priviledge, because he fulfills not all the qualities, and it is very well known, that the way is ordinary Calsay, and that the House and Mercat are not distant three pair, and the Lord *Coupar* used ordinarily to walk there unsupported; So that when he took support, especially at a time when he designed so much to go unsupported, it shews convincingly, that his infirmity, though not himself, remained still disobedient to all their designs. and though they could force him to dispoise, yet they could not force him to be found; and your Lordships may easily judge, that these who were at so much pains to make this Disposition subsist, were not wanting to use all endeavours for carrying him over this last difficulty, so that this support proceeded not from

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from chance, but from necessity.

Seing then your Lordships have been so rigid observers of the Law, in prejudice of poor Children, and poor Relicts, who were unprovided, I hope you will not prostitute it in favours of a stranger who had formerly gotten all the Defuncts Estate in Jointure: Reward not thus the importunity of Wives, and bribe not avaritious persons to trouble us at a time, when we shall think all time too short, to be imployed in the service of Him, whom we have so much, and so often offended: And take not from us in one Decision, the protection of the Law, when our Judgements are frail, the quiet of our Souls when we are sick, and the love of our Successors when we are dead.

The Lords reduc'd the Disposition.

For the Countess of Forth, &c. against E. C.

EIGHTH PLEADING.

How far Restitutions by way of Justice, are prejudged by acts of Indemnity,

I Might stand in the next degree of guilt, to those who forfeited the Earl of *Bramford*, if I thought that his Merit, or your Lordships Loyalty needed, that I should urge much the favour of his case: He was a person who carried

the honour of our Nation, as far and as high as could be expected, from the happiest Subject in much better times: for after that his Merit, arm'd merely by his own Valour, and rais'd him to be General in *Sweden*, he was chosen General in *England*, in a War, wherein all his Nation were surprised, and did there, actions worthy of our Praise, and their Wonder. But whilst he ha refus'd to draw a Sword against his Countrey-men even whilst they were Rebels, they forfeited him for fighting in a Kingdom, over which they had no Jurisdiction, and forfeited him by His *Majesties* Laws, and at the pursute of His *Majesties* Advocate, when he was hazarding his life for His *Majesty*, by His own command, and in His own presence; and the very day after he had gain'd the Battel for Him, which if prosecuted according to that brave Generals advice, might have secured to Him, that just power, which those Rebels were serving out of his hands. The Earl of *Forth* being with His *Majesty*, restor'd to his own, his Lady and Daughter pursue such as intromitted with his Estate, and insist now against *E. C.* who for being General to the then Estates, got 40000 pounds out of the Estate of the Earl of *Forth*. which was a part of that Sum, which was due to his Lordship upon an heretable Security, by the Earl of *Errol* and his Cautioners. In which Debate, if I use terms which may seem indiscreet and zealous, I must be pardoned, since I shall use none but what are forc'd upon me by that Act of Parliament by which I plead, since *E. C.* is a person to whom I wish much success in every thing save this debate and to whom my respects are above jealousy.

It is alledged for *E. C.* that though such as are restored

restored against forfeitures, by way of Justice, may by vertue of their Restitution, repeat all that is extant of their Estate, yet they cannot repeat what money belongeth to them; for money being *res fungibilis*, and naturally subject to consumption, it passeth from hand to hand, without bearing any *impressa*, whereby such as intromet with it, may know how it came, and whose it was: Nor doth the nullity of a Title in the first Obtainer, infer repetition of money from such as derive a right from them, as may be clear'd in many instances, for if money had been payed to one, who obtain'd an unjust sentence from the late Usurpers, yet they would not be liable in repetition, after that sentence were revived and declared null.

If one should serve himself Heir unjustly, & as Heir assign a Sum to one of his Debtors, tho' his service were thereafter reduc'd, as unjust, yet could not his Assigney be obliged to restore what he recovered by vertue of that assignation. If the exchequer should presently gift an Escheat, tho' the Escheat and Horning whereupon it proceeded, were thereafter reduc'd, yet a Sum payed by vertue of that Gift, when standing, could not be repeated, & if this principle were not sustained, all Commerce would be destroyed; and though *E. C.* his Title be now reduced, yet it was valid the time of his intromission, which is sufficient to astruct his *bona fides*: and Lawyers, even in intromissions with money, which was at first robbed, consider only *Vin illam quæ intervenit tempore numerationis*; whereas here, though the Estates did most unwarrantably and rapinously forfeit the Earl of *Forth*, yet his money being brought in to the publick Treasure, and confounded

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with

with their Cash, it ceased to be his, and became theirs; and therefore, *E. C.* being Creditor to to them, as he might have taken any Precept justly from them, payable out of their Treasure, So might he have taken Precepts upon his Estate, which ceased to be his: Nor can the Earl of *Forth* be said to be a loser by *E. C.* seing the Estates for the time would have brought it in, and converted it to their own use, in which case, *Forth* would not have got repetition against the persons to whom it were payed.

To these grounds, it is (my Lords) replied for the Earl of *Forth*, that there is a difference stated in Law, betwixt restitutions by way of Grace, and restitutions by way of Justice ; in restitutions by way of Grace, the guilt remains though the punishment be remitted, and the person forfeited is restored, not to his Innocence, but to his Estate, and therefore he recovers only what is extant of his Estate. But in restitutions by way of Justice, the Sentence forfeiting is declared never to have been a Sentence, and therefore, it can never be sustained as a Warrant to any effect, *Sed comparatur juri postliminii & fingitur nunquam intervenisse, & tantum restituit justitia quantum abstulit injustitia* ; And therefore not only what is extant, but all that belonged to them there is restored. But Sentences forfeiting may be distinguished further, (as *Bissius* observes, *tit. de remed. Justitiæ*) into such, as though they were unjust, yet every privat person was not obliged to know the injustice of the forfeiture: as if a man had been forfeited in a Justice-court for murder under trust, or a Landed-man for theft against which sentences, though the person forfeited were restored, yet

might

might seem hard, that such as intrusted by vertue of Warrants or Assignations from the Estate, should be forced to restore all they received; but others may be forfeited, as the Earl of *Forth* was, by vertue of Sentences, which were no sooner pronounced, than they became Treason, by an execrable inversion, not in the Pannel, but in the Pronouncers, and were not only Treason of their own nature, but behoved to be acknowledged treasonable by all such as heard of them, and such sure was that Sentence pronounced against the Earl of *Forth*; which was against the fundamental Laws of this and all Nations, and which is declared by the Act of Parliament restoring him, to have been, at the time it was pronounced, an Act of Rebellion, and an invasion upon his Majesties Royal prerogative.

This being the state of this restitution, It is my Lords, answered to the Defence, that it is defective in the application of all its parts; For, that this money was not *res fungibilis*, appears, because the Law distinguishes all Estates in *mobilia* (*quæ sunt fungibilia*) *immobilia*, & *nomina debitorum*. *Nomina debitorum* are Bonds due to the Creditor, which are of a middle nature, betwixt movables and immovables, and these fall certainly under restitution by way of justice, even according to the Defenders own Principles, for they bear the name and *impressa* of him to whom they belong, and so the Intruster is warned to beware of them: and that this money craved here to be repeated was such, is very clear, for it was due upon an heretable Bond to the Earl of *Forth*, by the Earl of *Errol* and his Cautioners, and came never in, nor was confounded with the Publick Treasure

Are ; for *E. C.* got a Precept upon it; before the Publick obtained a Sentence for it, and got a Warrant for that specifick sum owing by that Bond to the Earl of *Forth*, and got payment of it from the Earl of *Forths* Debtors, as Debtors to him: so far did just Heaven allow this haste to be its own punishment.

As to the second Member of the Defence, which is founded upon his *bona fides*, to intromet with the Sum for payment of a Debt due to him, (he having been general at that time) from an Authority then in being ; It is replyed, that *bona fides* in the Intrometter, doth not extinguish and take away the Right of the true Proprietar, *nam quod meum est, sine facto meo a me auferri nequit.* And Lawyers Determine, that to denude a man of his Property, there must be some fault of his, either *se obligando*, or *delinquendo*; neither of which can be alledged in this case; and if the Earl of *Forth* was never denuded, then *Calendar* could have no Right ; for, *duo non possunt esse domini in solidum unius & ejusdem rei*, which maxim holds still in *specibus & nominibus debitorum*, for though sometimes it may fail in numerat money, the dominion whereof is, for the good of Commerce, sometimes transmitted by simple numeration ; yet it never fails in *specibus, seu corporibus*: and that money due by Bond, is not of the nature of *pecunia numerata*, is clear from *l. si certus ff. de legat. 1.* And if a Robber take away my Cloak, and give it to a Stranger, yet I would *per rei vindicationem* get it back, notwithstanding of the Defenders *bona fides*; but here there was no *bona fides*, seeing *E. C.* was obliged to know, that the Earl

of *Forth* was unjustly forfeited, and that the Act of Parliament, against which there is no disputing, has declared it to have been Treason; And if *E. C.* were pursued for opposing His Majesty at that time, or for concurring to the forfeiting of the Barl of *Forth*, he could not defend himself otherways, than by the Act of Indempnity: *Ergo*, in the case of restitution of *Forth's* Estate, which is excepted from the Act of Indempnity, That Warrant proceeding upon forfeiture, cannot defend him; for how is it imaginable, that his *bona fides*, which could not defend him against the losse of his own Estate, shall be able to defend him against the restoring of *Forth's*, to which he had *aliunde* no Right? There is no *bona fides*, but where it is founded upon a Title, *Et ubi non subest Titulus, ibi non est admittenda bona fides*; But so it is, that *E. C.* his Title, *viz.* The forfeiture of the Earl of *Forth*, is declared by Parliament, never to have been a Title: But *E. C.* who was a Member of that Parliament which forfeited the Earl of *Forth*, and General of that Army which defended them, is in the same case, as if two Robbers had taken a Bond from a free Liege, and had given it to one of their own Society, who was at least a spectator; In which it is most certain, that the free Liege so robbed, would recover payment from him who intromitted.

By this unwarrantable intromission with the Earl of *Forth's* money, *E. C.* Became his Debitor, and the supervenient Act of Indempnity could no more defend *E. C.* against this, then it could against his other Debts. Indempnities are designed to secure against the Princes Pursuits,

who gave them, but not to ruine Innocents, else were these Indempnities, Acts of Injustice, not of Clemency. *Si criminaliter captum judicium interventu indulgentiæ scriptum est, habes tamen residuam indagatorem, & potes de fide Scripturæ civiliter queri*, l. 9. C. ad L. Cornel. de fals. Amnesties are but general Remissions, and so cannot be stronger as to all Crimes, than a particular remission is as to one: But so it is, that a particular Remission can only dispense with the Princes Interest; nor doth it cut off the Pursutes of privat persons, as the former Law observes very well, and the Emperor in another Law tells us, *Nec in cujusquam injuriam beneficia tribuere moris nostri est*. l. 4. c. de emancip. libero.

From these Grounds, your Lordships have an easie and just prospect of the answers which may be made to the instances adduced; for we are not in the case of such as obtain Gifts from the present Exchequer, nor Rights from Heirs once lawfully served: for the jurisdiction whereby these Rights are established, are not *funditus* taken away, nor were the singular Successors obliged to know the Sentences, whereupon their Rights were founded, to have been null, as *E. C.* was in this case; nor can this prejudice Commerce, except among such as are obliged to know the grounds of their Commerce to have been unwarrantable, and Rapines & Violence *sunt extra commercium*, which is so far from being an absurdity, that it is an advantage; for this may help to stop all Commerce amongst Rebels and Usurpers, and to loose these cords by which they are tyed: and from this, I beg leave to represent to your Lordships, that by this decision you will domore to hinder Rebellion,

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on, and to encourage Loyalty, then Armies can do; for since no man will hazard hanging and damnation by Rebellion, without he be baited to it, by the certain expectation of a Prey; So, if Rebels find, that they can never be secure of any Prey so obtained, they will certainly neither be so eager to have such as are Loyal forfeited, nor so desirous to settle upon themselves, Estates so robb'd.

As to that principle, that whatever defect was in the Title here, yet there was none in the numeration of the Money, and defects in the numeration are only objected against singular Successors; It is answered, that *vis est vitium reale, & efficit rem ipsam licet transferit per mille manus.* And this original sin infects the whole issue, for the States could not transmit a better Right then they had themselves, *nemo potest tribuere alteri plus juri, quam ipse in se habet:* and *Plin. lib. 3. epist. 9.* informs us, that *Cacilius Classicus* having robbed the Province which he commanded, and having payed his Creditors with the Snms extorted, *pecunia quas creditoribus solverat, sunt revocata.* But though this might be alledged where there remains still some colourable Title in the Author, and where the singular successor was not obliged to know the defect, yet in this case it can never be pretended by *E. C.* whose Right is *funditus* taken away. and who was at the time the money was assigned, or was numerat to him, obliged to know that defect in his Right, which is now the ground of this restitution.

I shall not trouble your Lordships, with answering those Objections, founded upon the Earl of *Forths* Ratifying and homologating his own Forfeiture, by giving in a Petition, 1647. when

he was content to accept back his Heretage, without these sums; for it is known, that Petition was not signed by himself, nor did he ever appear before those Usurpers; and what was done by his friends, cannot bind him, especially whilst that Usurpation continued, under which he first suffered; nor to the Act, 1662. Wherein some Intrumetters are declared free, for that Act was only conditional, and upon provision that His Majesty should pay the Earl of *Forths* Successors 15000 Pounds Sterling, out of the Fines, which condition was never purified, and I wish it had, for that was much better than what is here expected: these grounds are such, upon which none but such as are ready to drown would fasten: But, my Lords, if I needed to preposseffe you with what the Parliament designed in this restitution, I might easily clear, that they designed these Intrumetters should be lyable; for when Duke *Hamilton* and the Earl of *Errol* were absolved as the immediat Debtors, it is very well known that they were absolved upon expresse Provision, that they should deliver to the Earl of *Forths* Successors, such Papers as might prove the intromission of these Defenders, which had been unnecessar if the Intrumetters had not been lyable, and the reason why these Debtors were absolved had been groundless, if Intrumetters had not been lyable. But to what purpose should the Parliament have restored *Forth*, if they had not designed the Intrumetters should be lyable? For the Parliament knew, that there was nothing else, which could have been reach'd by this restitution, except these moneys now pursued for, and so their Justice had proved an airy and empty *Fanfara*, bringing nothing

thing with it but the occasion of certain spending, upon an uncertain expectation: to avoideall which debate, the Parliament have expressly ordained the first Debtors to produce these Papers, for proving against these Introuetters, who are hereby declared lyable, which words are so expresse, that they preclude all cavil, as well as difficulty.

(This being the nature of our Pursue, and these the answers to any pretended difficulties, It is humbly recommended to your Lordships, to give a Testimoney of your hatred against those violent courses formerly practised, and to teach posterity what such invasions may expect. I know well, that no man has deserv'd better of His Majesty, then *E. C.* hath of late; and I hope, that when you have decided against him, he will hearrily acquiesce to your Sentence, as a further proof of his sincere Loyalty, *Nec tollitur peccatum, nisi restituatur oblatum.* I confess, that he did not yeild to those impressions, till they had overcome the whole Nation, and that nothing but the perswasion of his being then employed in the service of his conscience and Countrey, could have withdrawn him from the service of his Prince: But this can plead no fur her, then that his Prince should pardon these escapes, not that he should reward them, especially to the prejudice of His faithful Friends.

The Lords sustain'd the Pursute, and repell'd the Defences.

A Debate in favours of the Earl of Forth, against E. C.

NINTH PLEADING.

Now far a person unjustly forfeited and restored, may repeat Annualrents from the Introuettors.

IF I were not (my Lord Chancellor) very confident of the Justice of my own Cause, and of your Lordships Learning, as well as Integrity ; I should be somewhat jealous, that the learn'd discourse you have heard, in favours of my L. C. might leave some impression. But, my Lord, I think it impossible that any, beside those unjust Judges who forfeited the Earl of Forth of his principal Sum, would again Forfeit him of his Annualrents ; nor do I imagine, that even those would have done it, if they had not been distemper'd by their own seaverish zeal, and that national fury : so that if your Lordships should follow their example, you should share their guilt, but want their excuse.

It is (my Lord) now alledg'd, that E. C. is not lyable in payment of Annualrent to the Earl of Forths Successors, because Money is of its own nature *res sterilis*, and in Law bears not naturally Annualrent ; and therefore an Introuettor, though *predo*, though *mala fidei possessor*, is not lyable for Annualrent, for no man is obliged to improve anothers mans Money : and by the civil Law, (which was more ready to give Annualrents than

than ours) *In corporibus ex quibus fructus naturaliter proveniebant male fidei possessor*, was lyable in *fructus productos*, but in *corporibus que non producebant fructus de sua natura, nec preda, nec latro tenebatur in fructus*; and though a person who impropriated publick Money was punishable, *ratione repetundarum vel ex residuis*, and so was there most unfavourable, of all Introuettors, yet he was not lyable in *usuras*; nor by our Law are Annualrents ever due, *sed ex lege, vel ex pacto*, neither of which can be alledged in our case; and the Act of Indemnity hath made Introuettors with publick Money lyable in repetition, and though their Introuission be most unwarrantable, yet are they not made lyable by that Act in Annualrents. Likewise, though these Moneys due to the Earl of Forth, did at first bear Annualrent, yet they being once uplifted, became a Sum lying in Cash, which E. C. was not oblig'd to re-employ upon Annualrents, and by the Act, 1662. whereby His Majesty was to repay the Earl of Forth, he was only to be repayed of his principal Sum, but not of his Annualrent.

To which, (my Lord) it is answered for the Earl of Forth, That since your Lordships have found E. C. his Title to have been unjust, we must debate now against him *tanquam*, at least, *male fidei possessorem*; for the Act of Parliament has declared this Forfeiture an Invasion upon His Majesties Prerogative, and you have by your Sentence, found it not be shelter'd under the Act of Indemnity.

Let us therefore, in the first place, consider that the Law never design'd to favour oppressors, nor suffer the innocent to be prejudg'd; it never design'd

design'd that men should enrich themselves by their guilt, and be rewarded for their violence. And since the fear of punishment is scarcely able to restrain that wickedness, to which we are naturally prone; it were absurd to highten our vitiousness by rewards; whereas, if *mala fidei possessores* should not be lyable to repay Annualrents, they should be enrich'd by their oppression, and should be baited to commit violence, and to maintain themselves in it; for they should be sure *lucrari* (at least) *usuras rei, per vim & injuste adempta*. And therefore, my Lords, though the Law makes a distinction *Etiam in mala fidei possessore, inter corpora, ex quibus fructus naturaliter proveniunt, & corpora sterilia*: yet, they do not this upon design to favour Vitious or Violent Intromettors, but in order to the several ways of taxing the restoration of the person injured; for, where the Bodies unjustly intrometted with bear fruits, they ordain the fruits to be restor'd, but where they bear not naturally fruits, the Law doth not ordain the Intromettors to be free, but to be lyable in *damnum & interesse, & in omnem causam*; this the Law defines to be all the advantage could have arisen out of the thing intrometted with: this being an uncontraverted principle, I humbly conceive, *E. C.* should be lyable to these Annualrents acclaimed, and that upon these three considerations.

First. This Sum intrometted with by *E. C.* was a Sum bearing Annualrent; and therefore, *Forth* being restored by way of Justice, he ought to be put in the same case he was in before the Forfeiture: and if the Money were now lying unuplifted, *Forth* would be preferred to *E. C.* *quoad* these Annualrents,

Annualrents, which clears, that they were never due
 to E. C. and if they were not his, he ought to re-
 store them. The Forfeiture is declared to be no
 Warrant, and so, though E. C. were in the same
 condition as a Stranger is, who intromets with a-
 nother Strangers Money without a Warrant, yet
 sure he would be lyable in Annualrents, if he in-
 trometted with a Sum bearing Annualrent; much
 more then ought he to be lyable, who hath intro-
 metted with a Sum, which was unjustly and pre-
 doinously intrometted with. For here, E. C. is
 in the same case, as if a man had broke my house,
 and had taken away my Bonds with blank Affig-
 nations lying beside me, and had uplifted for ma-
 ny years, the Annualrents of these Sums; or if a
 man had, upon a false token, taken up my Mo-
 neys which bear Annualrent; in which cases it is
 most undenyable, that the Vitious Intromettor,
 would be lyable in re-payment of the Annualrents;
 and to invert one of the Defenders own in-
 stances, it is not imaginable, if any should uplift
 a Sum belonging to a person lately Forfeited, and
 which did bear Annualrent, that the Exchequer
 would not exact Annualrent from the Intromet-
 ter. I might here urge likewise, that a Minors
 Money intrometted with, bears Annualrent by
 the Civil Law and ours; and it is most clear, that
pinguius succurritur restituto, per modum iustitiæ quam
minori, as Bossius well observes, tit. de remed. iust.
num. 3. & Jason. ad l. Gallus ff. de liber. & post-
lim. for, as they are equal, in that neither did
 consent to the Intromission, so he who is Forfei-
 ted for his Countrey, deserveth more favour than
 a Minor doth; and many things are in Law al-
 lowed *ob bonum rei-publicæ*, but we are not here in
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the case of *corpus sterile*, for Money bearing Annualrent is not *corpus ex sua natura sterile*, but *habet fructus ex se facillimè provenientes*; *usura est Tonus seu partus pecunie*, and should rather be restor'd then *fructus prediales* ought to be, for in these the Intromettor bestow'd his industry, but here Annualrent doth grow very easily: and that Annualrent is due, even where it was at first *sterilis*, is clear from *S. quid si l. item veniunt ff. de hered. petit. quid si post venditam hereditatem hic ipse res venient, fructusque earum, sed si forte tales fuerunt, quæ vel sterilis erant, vel tempore petituræ & hæc distracta sunt vero pretio, tunc potest petitor eligere ut sibi pretia & usura præstentur*. Upon which Law, the Doctors observe, that *mala fidei possessor tenetur rem ipsam restituere, si extet, vel pretium & usuras, si non extet*: but much more, where Money bearing Annualrent is intrometted with, for there the proper *damnum & interesse* is Annualrent, and our Law calls Annualrent the interest of Money. So that though the Money had been *sterile*, yet the Vicious Intromettor would have been lyable in *damnum & interesse*, and the damage and interest of Money is Annualrent: nor is this Money of the nature of that Money, which the Law makes *sterilis*, for here was an heretable Bond bearing Annualrent, *nomen debitoris*, and which in our Law is not accounted *inter mobilia*, and such a Bond *pro pseudo habetur*; nor can it be ever said, that this heretable Security was lawfully loos'd, no requisition having ever been made.

- Another ground I go upon is, That *mala fidei possessor, tenetur non solum in fructus preceptos, sed in percipiendos, l. sed & partus ff. quod metus causa*; Where the Law determines, that when any thing

is vi, vel metu taken, *partus ancillarum & serus pecorum, & fructus restitui, & omnem causam oportet; nec solum eos qui percepti sunt, verum si plus ego percipere potui & per metum impeditus sum hoc quoque præstabit.* And when Lawyers consider *fructus illos percipiendos qui sunt restituendi à mala fidei possessore*, which they call *fructus civiles*, they define them with Bartolus, *ad l. ex diverso ff. de rei vindicat.* to be *vel quos petitor percepisset, si ei possidere licuisset, vel quos possessor quo alius diligentior non est percipere potuisset.* According to which Characters (worthy of their wonderful Author) these Annualrents are to be restored upon both accounts: for they might have been uplifted by the Earl of Forth, if this Forfeiture and Intromission had not interveened, and by E. C. had he continued these Sums for after-years, as in the beginning, in the Cauti-
 oners hands, or if he had re-employed them in other hands upon the first terms; and if he, studying either his own gain or convenience, has inverted the primitive use of Forths Money, should either his gain or humour prejudice Forth? *Incuria sua in rebus alienis nocere non debet.* And Copus Parisiensis doth excellently observe, that *Sicut ille qui culpa desit possidere pro possessore habetur, ita & ille qui fructus percipere potuit pro percipiente habetur, si culpa sua desit non possidere*, what can be more solid, or plain, though E. C. had not employed them upon Land, whereof he has reaped the fruits constantly, since they were so imployed? If a man be violently ejected out of a Milln which was grinding, a Coal-heugh, or Salt pan which was going, he would certainly be restored, not only to his Coal-heughs or Salt-pan, but to all that they might have yielded; much more than
 ought

ought he to be restored to his Annualrent, which was a more sure product than these. And whereas it is pretended, that an Intrometter, though wanting a just Title, is not obliged to improve the Money so intromitted with by him, and so cannot be lyable to pay Annualrents for it ; It is to this answered, that though he be not obliged to improve them, yet he should be lyable, if he altered the natural improvement of them : this would not be allowable in *bonæ fidei possessore*, much less ought it to be indulged in *mala fidei possessore*, and though the Intrometter in *crimine repetundarum*, be not lyable in *usuras*, yet he is lyable in *quadrum*, which much exceeds these, and would also be lyable in *usuras*, if he intromitted with publick Money bearing Annualrent, which is our case. And whereas it is pretended, that Annualrent is in our Law only due, *ex Lege, aut ex Pacto* ; It is answered, that Annualrent is here due, *& ex Lege, & ex Pacto* ; *ex Lege*, because in restitutions *ex Justitia*, the Party ought to be restored in *integrum, cum omni causa*, in which Annualrent is included : *& ex Pacto*, because C. hath given his Bond to secure the Debtors, as to all damage or interest they could sustain.

The third Principle I fix upon is, That E. C. gave his Bond to relive the Earl of Kinnoul and Errols Cautioners, of all damage and Interest they could sustain by paying these moneys to him; and therefore, seing they are now absolved by the Parliament, upon express provision, that they should make out the intromission of such to whom they payed the Money ; it follows by an Infallible inference, that they are lyable to the Earl of Forth for what damage he sustained, and he by

by this Sentence, is surrogat in their vice ; and *E. C.* having given this Bond, should have always lookt upon this money, as that which he was moe ways than one tyed to improve, and should have known, that this Talent was not to have been laid up.

I will not burden your Lordships, with satisfy- ing the clamours rais'd against the rigidity of this Pursute. It is not craved, that the King would bestow *E. C.* his Estate upon *Forth*, but that *Forth* should be restored to his own, *E. C.* his Life and Fortune being at His Majesties disposal, as excepted from the Act of Indempnity: The Ransom craved, is only to restore the Earl of *Forths* Estate. We desire not *E. C.* should be made poor by his Crime, and it were unwarrantable to desire that he should be enriched by it, especially when his being enrich'd will necessarily starve them, who had never any requital for their Loyalty, save this Act of Justice. *Forths* Lady and Family have been forced to borrow money at dear rates (as all starving people do) to supply their want of these Annual- rents, and if they be not restored to these, they are still to be Beggars, for the Principal will not pay their Debts; and so they must wander the indigent instances of their Princes unkindness, and Countries injustice, whilst their Oppressors do warmly possesse their Estates, as the reward of their opposition to his Majesty.

Not decided in jure.

For

For *Bartholomew Parkman*, against
Captain Allan.

TENTH PLEADING.

Whether Ships taken after they have carryed Contraband-goods; can be declared Prize.

MY Client is, I confess, (my Lords) taken as an enemy to his Majesty in this War, but it is by a Privateer, who makes all rich Ships so; his Ship is adjudg'd Prize, but it is by the Sentence of a Judge, who having the tenth of all Ships as his share, was too much interested to release her when she was taken: but our Law being jealous of that Court upon that account, has allow'd a remedy by your Justice, against what injustice they could commit; and when we are concern'd with Strangers, and to let Forreigners know what Justice our Countrey dispenses, it was fit that they should have entrusted the Decision to your illustrious Bench, whose Sentences may convince, if not satisfy, even such as are losers by them.

The Sentence adjudging that Ship Prize, is by the Admiral, founded upon these two grounds, first, that his Majesty has, by his Declaration ordain'd, that all Ships which were sail'd by his Majesties enemies the Hollanders, should be seiz'd upon as Prizes, & this Ship was sail'd by Hollanders, at
least

least three of them were of that Nation. The second ground was, that he carryed Contraband-goods, for supplying his Majesties enemies, viz. stock-fish, and Tar; and though he was not taken with these Contraband-goods, ye he was taken with that Salt which was the return of these, having loaded in Salt as the product of these Goods. My Client has rais'd a Reduction of this Decreet, as unjust, and reclaims against it upon these Reasons.

As to the first reason of Adjudication, bearing, that the Ship was fail'd with three Hollanders, he alleadges that the *Swede* being an Alley, was not obliged to take notice of the King of *Englands* Proclamation of War, which is indeed *Lex Belli*, toward his own Subjects, and may warrand them in what they do against the Hollanders, who are declared Enemies; but no Laws made by him can oblige Allyes, further than is consented to by expresse Treaties amongst them: and it were unjust, that because the King of *Britain* designs to make War with *Holland*, that therefore it shall not be free for *Swede* to use any Hollanders in their Service, especially since without Hollanders, it is impossible for them to manage their Trade; and were it not unjust, that all the *Swedes*, *Spaniards* or others, who had employed the Hollanders before the War to fill their Ships, and had relyed upon their service, should be forced immediatly, upon declaring a War, to lay aside all Trade; and if it were unjust for any in *Britain* to take prisoner a Hollander, who served a *Swede* in *England*, much more unjust it is to take their Ship and themselves as Prize, because they were served at Sea by Hollanders: Nor is it advantageous for the Interest of *England*, that

that this gloss should be put upon the Proclamation, since it is *Englands* interest, that the *Hollanders* should all desert their Countrey, and serve abroad amongst Strangers; whereas, by the gloss, they would be forc'd to stay at home, since none else could employ them; and this will extremely gratifie *Holland*, who commands under severe pains, by publick Placards, that none of their Subjects, especially Sea-men, should serve abroad.

It is also humbly represented to your Lordship that some of the three who are *Hollanders* are only young Boyes, who have no constant domicile, but serve where they can have employment, and Servants are, by the Laws of *Oleroon* (which are not the *Lex Rhodia* of *Europe*) accounted Inhabitants of that place where they serve; and we consider not *domicilium originis in servis*, for they in all sense and amongst all Nations, follow the domicile of their Master, else the power of Masters would be much impair'd, and Commerce much entangled. Likeas, it is fully proven, that these men were not employed upon design by my Client, but were hired by him upon the death of such as served him when he was in *Denmark* and *Holland*, which necessity is sufficient to defend Subjects and much more Allies; nor is it imaginable that a *Suede*, who is not concern'd in the War, should if his men die in *Holland* or *Denmark*, ly idle there and lose his Trade, and stay from his Countrey, because he cannot employ his *Majesties* Enemies, nor would *England* allow this, if they were Allies, and the *Suedes* only concerned in the War: and though in a former case, your

Lordship

Lordships adjudg'd a Ship called *the Castle of Rigga*, because sail'd by Hollanders, yet the greatest part of the Sailers were Hollanders in that case, whomight, because of their Number, have commanded the Ship and taken her to *Holland*, or have with her fought against his Majesties Ships, and have made them Prize, when they were secure. Nor doth it follow, that because his Majesty in his Treaty with *Spain*, has allowed the *Flandrians* a liberty to sail with Hollanders, that therefore it must not be lawful to sail with Hollanders; for the design of that was not so much to allow the *Flandrians* to sail with Hollanders, as to secure them against seizures, upon the presumption of their speaking Dutch, because of the vicinity of their Language, says the Treaty; and if this had not been granted to the *Flandrians*, all their ships might have been brought in, upon pretext that they were sailed with Hollanders..

The second reason of Reduction, upon which my Client craves to rescind that pretended Adjudication, is, that though he had carryed in Stock-fish and Tar to his Majesties Enemies, yet except he had been taken when he was actually carrying these Contraband-goods, his being taken with the return of these Goods, was not sufficient ground of seizure, which I shall endeavour to evince by many reasons; First, That by no Law, Strok-fish nor Tar can be called Contraband, being Contraband-goods are only such as are determined to be such by an expresse Treaty, or by the general Custom of Nations; neither are Contraband-goods still the same every where, but are by private Treaties with Allies, established to be such, in respect of such terms as are agreed upon

betwixt them; and generally these are only counted Contraband-goods *quoad* Allyes, which have no use in the place to which they are carryed, but for carrying on, and maintaining the War; and seing the reason why Contraband-goods are prohibited, is only that Allyes may not assist in the War against the Confederats, it is therefore very consonant to reason, that the Law should only interpret those Goods to be Contraband, which serve properly, and immediatly for maintaining the War, and Tar cannot be called such, seing it serves more for Peace, than War; and though an naval War cannot be carryed on without Tar, yet Tar cannot be said to be Contraband, no more than Cloath, Stuffs, Linning, or such things, can be called Contraband, seing a War cannot be carryed on without these: and if we look to the Treaty betwixt the Crowns of *Britain* and *Sweden*, we will find, that Tar is not enumerat in that Article, wherein it is declared what Goods can be accounted Contraband, and in such special Articles as these, *inclusio unius est exclusio alterius*, especially where it appears to be designed by both parties, that their Subjects should be informed, what should be lookt upon as Contraband; and it was very fit that their Subjects should have been informed expressly, else that Treaty could but prove a snare; and if we look narrowly unto the nature of the particulars there enumerat, we will find, that there is nothing there expressed to be Contraband, but what is only and immediatly useful for the War; and there is no general in all that Article, but only *Instrumenta Bellica*, which cannot be extended to Tar, without an evident wresting of the word.

2. Though by an exprefs Article, the carrying in Victuals to Enemies be discharged as Contraband-goods, and that under the word of *Comeatus*, yet Victual is only declared to be Contraband, in case it be carryed to any of the Enemies Cities when they are besieged, *Si Civitas sit obsessa* (saith *Grotius*) which restriction was very reasonable, for then the carrying in that Victual was the relieving and the maintaining of an enemies Town against the faith of the League; for there he who doth feed, doth defend: and though *Pesh.* relates, that the Dantzickers did confiscat, in anno, 1458. sixteen Sail of Lubeckers for carrying Victual to the enemies, yet he forgets to tell whether the enemies were besieged, but he expressly relates, that there, the carrying in Victual was expressly prohibited. I find, that by the Roman Law, *l. 2. C. queres export. non deb.* it is declared unlawful to carry or sell Arms to the Enemies of Rome; but though in Law, all that is not forbidden is allowed, and that there be there a full enumeration of what should not be carryed into Enemies, yet Corn is not at all specified. And by the Canon Law, all such as supply Turks, and the other Enemies of Christian Religion, with Guns, Swords, & *aliis metallorum generibus, & instrumentis bellicis*, are anathematized; yet, there is no execration pronounced against such as supply them with Victuals: And though to carry Wine or Oyl to Barbarians was punishable by the Roman Law, *l. 1. C. eqd. Ne quidem gustus causa, aut usus commerciorum*, least the delicacies of the Italian Fruits should have tempted those to invade it, yet that Law did not at all reach their Allies, nay, nor did it so much as prohibit even in Subjects, the sending Corn to

Enemies who were not Barbarians : So that what ever may be alledged against Allies, who buy Corns to carry into Enemies; yet it seems most unjust that the Swedes, who carry in only their own product, either Corn, or Stock-fish to sell them, should be proceeded against as enemies upon that account; and at this rate, Sweden could nowhere sell their Corn, nor other native Commodities, for they can only vent them either in Holland, France, England, or Denmark, and all those being now engaged in this War, the poor Swedes behoved to loss all their own Rents, and want all these necessaries with which they can only be supplied from the product of these, and here the Swedes cannot be so properly said to supply the Hollanders, as to entertain themselves, and his Majesty would sooner starve thus his Allies, than his Enemies. And though Princes may impose these hard terms upon their own Subjects, yet it were hard they could tie their Allies to the same terms; which makes me believe, that the decisions related by *Boer. decis. 178.* and by *Christianus, decis. 64.* Wherein they relate, that the exportation of Corns in time of War is a sufficient reason for confiscating both Ship and Goods, *Fruimenta, Vina & Olea, existente prohibitione ad externos, praesertim inimicos, exportare non licet, Christianus ibid.* for exportation being only prohibited, it can only extend to Subjects; for none can export properly but they; for Allies cannot be said to export when they trade, for to export is to carry out of the place where the prohibition was made.

I confess, that the carrying in Corns to Holland may seem a greater supply to them, than it would

be to any other Nation, because their Countrey cannot supply them with its native product; yet, since they have the *Rhine*, the *Metz*, and other Rivers open to them, in which his Majesties Ships cannot stop their Commerce, they will be abundantly supplied with Corns, though *Sweden* could be bound up by this Treaty from supplying them: So that his Majesty will prejudge thus his Allies the Swedes, in their Commerce, without wronging his Enemies, as to Corn or other Provision.

And to clear, that the *Comeatus* here prohibited, is only Corn carryed in to Cities besieged, or to Armies of the Enemies, but that our Allies are not absolutly prohibited to carry Corns to any who are in enmity with us; your Lordships will be pleased to consider, that *Comeatus* signifies properly, a liberty granted to Souldiers to go and return *salvum conductum*, as is most clear by the whole Title, *C. de commeatu*. And though some have taken the word thereafter in a translatitious sense, *pro cibariis & alimoniis exercitus*, yet to extend that to all Corn carryed in by way of Commerce to an Enemies Countrey, seems very hard; Especially where it is not carryed in *alimonie sed commercii ergo*, and though Corn as the staff of life, be sometimes specially prohibited, yet that should not be extended to Stock-fish and other less necessary provisions: and though it were extended to these, yet the carrying so small a quantity could no more be esteemed a contravention of the Treaty, then the carrying a little money (without which there can be no Trade) could be esteemed a breach of that part of the Treaty, where by *pecunia* or Money is ordained not to be carried;

Si quis ab initio sui usus causa exportaverit, postea vero quia non indigeret partem vendidit legem non offendit. Ludovic. conclus. 25. circa modum usus tunc *presumitur cum modico quantitas vendita est.* Tuld. tit. C. *quæ res export. num. 6.* From which I conclude, that the prohibition of carrying in Money, or Victuals, can only reach those who carry them in great quantities, or to besieged Cities, or Armies, or principally for the advantage of the Enemies, and for strengthening them in War against his Majesty; for since to restrain this, is the only design of the Treaty, the words in the Treaty should be interpreted suitably to this design: And thus this poor Ship can only be condemned for its original sin, having carried Contraband in the former Voyage.

Neither was there any such considerable quantity of these Stock-fish carryed in here, as might shew any design of assisting the Hollanders by Victuals, scing it was carryed in a small quantity, and might have been necessary for the Pursuers own Company; and if they had designed to have carryed these as Commodities, they had carryed them in greater abundance; and Tar is the product of Sweden, and so Commerce in it is necessary for them.

And whereas it is contended, that the Ship had formerly carried Enemies Goods, and consequently had transgressed that Article of the Treaty, whereby *bona hostium tuto advehere non licet*; It is answered, that if they had been taken carrying these Enemies Goods, the Goods could have been confiscated, but not the Ship; it being very clear by the Law of all Nations, that it is lawful even for Allies to freight their Ships to

to strangers, in order to civil Commerce, and that to hinder this liberty, is a breach of the Law of Nations, as is very clear by the Constitutions of several Nations, printed lately at Venice, where amongst other Articles, it is determined, *Si & navis & merces hostium sint, fieri ea capientium, si vere navis sit pacem colentium merces autem hostium* (which is our case) *cogi posse ab his qui bellum gerant navem ut merces in aliquem portum deferat, qui sit suarum partium ita tamen ut vectura pretium nauta solvat.* Since then by the Law of Nations, the Skipper behoved to have had this fraught pay'd, though he had been taken carrying enemies Goods, it were against all sense and reason, that his Ship could have been confiscat for carryng them: and Camden in the year 1597. tells us, that Pole did, by their Ambassador complain, that the Law of Nations was violat, in that the English had in their War with Spain, challenged their Natives for carrying their Goods to Spain. And Serviens relates a Decision, 12 December, 1592. wherein some Hamburgers were declared free, though they were taken carrying Corns and other Commodities to Spain, and because they were Allies; for the Parliament of Paris thought, that Allies deserved better than others.

If we consider the Treaty with Sweden, we will find, that Ships carrying Contraband-goods are only to be seiz'd on, *si deprehendantur*, which (like all words in Treaties amongst Princes) must be taken *in augustiori sensu*; nor suits it with the generosity of Kings to take little airy advantages of one another, and to debate

like pedantick Formulists, who ensnare one another, in thin cob-webs, as spiders do flees : but in no sense can these words *si deprehendantur*, be extended to the Ships being taken in any former Voyage, for else they had been superfluous and impertinent, since no Ship can be adjudg'd, except she be taken in some Voyage: the genuine interpretation of words is, *interpretari secundum subjectam materiam* ; and therefore, since these words are insert in a Treaty, wherein his Majesty is to indulge favours to the *Swedes*, they must be in reason so interpret, as that they may be a favour ; and there is no favour indulg'd here, if these words be not taxative, and if they declare not any Ship free, which is not seiz'd carrying Contraband the time of the seizure.

By our Law it has been very wisely provided, that we should use strangers in our Admiral Court, as they use us in their Countrey, *Act* 24. *Ja.* 1. *Par.* 9. And it is offered to be proven, by the Law of *Sweden*, Tar is not esteem'd Contraband, nor can Ships be declared Prize, for what they carryed in a former Voyage ; and since our Natives would complain of such usage in *Sweden*, let them not meet with it in *Scotland* ; which is very suitable to that excellent Title, in the *Digests*, *Quod quisque juris in alterum statuerit, ut ipse eodem jure utatur* : by the Law also of *England*, (as Judge *Jenkins* reports, in a return to your Lordships Commission) no Ship is confiscated upon this ground.

Be pleased (My Lords) to consider, what great prejudices would arise to Trade, if Ships might be seiz'd, upon pretext that they carryed

Contraband in a former Voyage ; for by that allowance, all Ships might be seiz'd upon, since this pretext might ly against all, and every poor Merchant might be left a prey to the ravenous Privateers , who might force them to ransom themselves from the very hazard of a seizure : in which case , whatever were the event of a Confiscation, yet still their time and expense would be lost , and their Secrets and Papers would be made open ; which is so great a prejudice to Merchants, that by the *Rhodian Law*, *Secreta τῶν ναυαρχῶν, non licebat introspicere, & introsipientibus ultimum supplicum irrogabatur.*

It was likewise very fit, that the Swede, and all Princes should ty the Privateers to a probation that fell under sense, and such is the having Contraband-goods presently aboard, *& ubi constare potest de corpore delicti*, and not lay poor Merchants open to the hazard of the testimonies of two rogues, who being tempted by malice or avarice, might depone falsely, that the Ship carryed Contraband-goods formerly : in which they might the freelier transgress, because they could not be control'd ; whereas no such falshood is to be fear'd, if only actual carrying can confiscat a Ship ; since there, the existence of the Goods precludes all possibility of error or falshood. Were it not also very absurd, to seize a Ship which possibly carryed Contraband in a former Voyage, and thereby ruine a great many Merchants who were the present fraughters of her, and who neither did, nor could know what she had carryed formerly ? And yet, she being seiz'd, their Voyage would be broke, and their fortunes ruined. Or , if another Skipper

or Owners had bought her from the first offender, were it not unjust to seize the Ship? and yet the Ship were prize, if this opinion could take place; this were to punish ignorance, and Commerce requires more latitude, than such Principles can allow.

It is, I perceive, urg'd from this opinion, that the Commissioners granted now, and of old, bear expressly a power to take Ships which have carried enemies Goods; and there is a Commission produced, in Anno 1628. of this Tenor, together with two Decisions of our Admiralty to the same effect, neither of which are concluding; For Strangers and Allies are not obliged to take notice of private Commissions, which are not *leges belli promulgatæ*; these may warrant against damage and interest, but not against restitution; and as to the Decisions, they are founded upon other grounds also. It is also urg'd, that the carrying Contraband being a Crime against the Prince or State who make the War, there is *jus quasitum* to them, by the very commission of the Crime, though the Defender be not then actually apprehended; as we see in other Crimes, which are punishable, though the offenders be not actually apprehended: But to this it is answered, that Princes may otherwise use their own Subjects, then they should be allowed to use Strangers; the having offended is sufficient in the one case, but actually offending is necessary in the other, for else our King might at any time, even after the War, seize upon one of these Ships, because (forsooth) there was *jus* once *perfecte quasitum* to him by the very offence, which is too absurd a consequence

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quence to be allowed: And albeit all that was done in the course of the War, be ordinarily caveated by the subsequent Treaties, as to the Nations who were engaged in the War; Yet Allies being secured by no such Treaties, their Subjects might still be lyable to seizures, and hazards of this nature, which were both unjust and inconvenient.

Consider that there is a difference betwixt such Allies, as are tyed in a League Offensive and Defensive, and such as only enter in a Treaty for their own advantage, as *Swede* has now done: The first are obliged to assist, and therefore, all correspondence in them were a breach, but in the other it is not so, and in them that *Maxim* holds, that *cuiuslibet licet uti jure suo; modo hoc non fecerit principaliter in emulationem alterius*: Though all this Traffique that is alledged were true, yet it clearly appears, that the great design of my Client, was not to serve the Dutch, but to maintain their own poor Families. in a way which the severest Lawyers could justifie. Remember how little *Swede* is obliged to *Holland*, who kept them lately from conquering *Denmark*; So that it is improbable they would have serv'd them, upon design to promote their War. Remember how much our Countrey-men were honoured lately by their great King, who preferr'd two of them to be Generals, and thirty to be Colonels at once in his Armies: And I must likewise remember your Lordships, that the probation in such cases is very suspicious; for there, a mans whole Estate depends upon two mean fellows, and such two, as are under the impressions of their
Ene-

Enemies, and who may expect at least their liberty as a bribe, and that their Depositions come to us by an Interpreter; so that though he did not mistake them (as he may) yet the trust resolves at most in his single assertion, who is but one man, and who by being the ordinary Servant of that Court, is much to be suspected; and therefore, your Lordships may call for the Witnesses, declare their persons free, and thereafter examine them.

Let us not be more cruel than the Sea, and more merciless than Storms, and after that these poor men have escaped those, it were inhumane that they should shipwreck upon our Laws, which were to them, like hid Rocks, upon which there stood no known Beacon. Figure to your selves (my Lords) how these poor mens longing Wives, send daily their languishing looks into the Ocean, as they can, to find them, or how the Creditors, who advanced necessaries for their aliment, expect payment from their return; and how it must prevent the starving of their poor Babes, whose craving appetites and cries, do probably now astonish their indigent Mothers; it is those you punish, and not only our appealers: and how would we use Enemies, who had murdered our Country-men, when we thus use our Allies. We alledge, that this is (my Lords) a case wherein Justice will allow some respect of persons; and since politick advantages have given their first form and being to this Law and Proclamation, whereupon this seizure is said to be founded, consider, I intreat you, how inconvenient it were to disoblige by a Decision, the
King

King of Sweden, whom your Royal Master, who understands best the advantages of this Crown, has taken pains to oblige by a Treaty, and how hard were it, if upon your Decision, that Prince should be forced to grant Letters of Marque, or lay an Arrest upon all the Vessels of our Nation Trading there, by which the innocent might be oppressed for the guilty, many might lose for the gain of few, and the present Unity of the two Crowns might be dissolved, by a Sentence of your Court.

The Lords jointly sustained the Adjudication, notwithstanding of this Debate.

For the Burghs of Regality, against the Burghs-Royal.

~~E~~LEVENTH PLEADING.

Whether it be free to all the Lieges to trade with Forreigners, or if this Priviledge be only competent to Burghs-Royal.

May it please your Grace,

Since Freedom, is one of the greatest Blessings, and pleasures of Mankind, those Laws which design to abridge or lessen it, must be very unsupportable, and unfavourable; except they bring other Advantages, which in exchange of his Bondage, can either convince our reason, or gratifie

gratifie our interest. But if we consider the Laws here founded on, whereby it is pretended, that none but Indwellers of Burghs-Royal can trade with Forreigners, we will find, that these Laws are so far from being advantageous, either to the Publick, or to privat persons, that they are a great bondage on the one, and a great impediment to the other. The Pursuers who desire to lessen the freedom of Trade, are the sixth part only of *Scotland*, who desire to retrench the Priviledges of the other five parts, and the priviledge wherein they desire to retrinch us, is our freedom, the very words of the Priviledge they crave are, *that we should be declared unfree-men*, and unfree-men imports, Slaves, in all Languages; and in reality, not to have liberty to export our own Commodities, is to be Slaves to such as may stop us, for in so far as they may stop us, they are our Masters.

That they are destructive to every mans Interest, appears from the restraint they lay upon his Inclinations, and upon his property; as to his Inclinations, they are very much restrained, in so far as though any of the Lieges did never so ardently desire to Trade, and though his breeding, and the situation of the place where he lived, did favour extreamly therein his Inclinations, yet, except he live constantly in a Burg-Royal, he cannot trade. They lay likewise a restraint upon his Property, because though the situation of his Estate be very advantageous for Trading, and his Estate consist in Money, yet can he not imploy that Money in Trade, which is the natural use of it; and thus in effect, these Acts tend to enslave both our Inclinations and our estates.

Nor

Nor do they less prejudice the common Interest, as will clearly appear by these Considerations ; 1. By this privilege, five parts of six in the Kingdom, are debarred from trading ; whereas it is a known Maxim in all Nations, that the more Traders, the richer always is the Kingdom ; and upon this consideration, the *English* and *French*, have invited all their Gentry to Trade, by declaring, that Merchandising shall be no Degradation from their Nobility and Honour. 2. The more Money be employed upon Trade, and the less upon Annualrent, the Kingdom is always the richer, for though private Parties may gain by Annualrent, yet the publick Stock of the Nation is not thereby improved, the one half gains there from another, but neither from Forreigners ; and if all except Burgessees be debarred from Trade, then the Money of five parts of the Nation must lye idle, or els must be lent to Merchants, which is not ordinar ; and to force us to lend, were unjust. 3. By this, the places in *Scotland* fittest for Trading, are kept bound up from using the natural advantages of their situation, to the great prejudice of the Nation, as we see in many instances, and particularly in *Lews* and *Burroughstounness*, to keep which from being Burghs, the Burghs have spent a great deal of Money. 4. This has ruined many little Towns, who because they were debarred from all privilege of Trading, were forced to get themselves erected in Burghs-royal, and after that they were erected, were forced to be at the expenses of keeping Prisons, being Magistrats, sending Commissioners to Parliaments, making publick Entertainments, and so did ruine themselves without any advantage to the

the Countrey : and by this, the Number of Burroughs are so far encreased, that it is a shame to see such mean Creatures as some of them, sent to our Conventions and Parliaments; who, notwithstanding they want both Fortunes & Breeding, yet must sit as the great Legislators of the Kingdom, and must have a decisive voice, in what concerns the Lives, Fortunes, and Honour of the greatest Peers in it. I design not by this to disparage all Burroughs, for most are represented by most qualified persons; but to tax these Laws, which have forced many little Towns, either to send none, or to send such as are unfit. 5. All the Countrey is ill served, for in some Shires, there are but very mean Burghs; and in these Burghs, Merchants yet meaner, and if these want Credit, to buy and carry out our native Commodities, they must ly upon the Owners hands, and the Countrey wanting necessary returns, such as Salt, Iron and Timber, must buy from very remote places. 6. If two or three Merchants in better Towns conspire, not to buy or sell, but at rates agreed upon amongst themselves, then the poor Countrey must be at their devotion, and this were to grant Monopolies, nor only in one place, but in every Shire, not only as to superfluous Commodities, (as use is, when Monopolies are granted) but as to all, and even the most necessary Commodities; after this, no man shall dare buy a Skin, Wine or Sugar, but a Burgesse, and which is yet harder, this will furnish a pretext to Burghs to oppress all such as they envy, under the notion of Unfree Traders. 7. His Majesties Customs will be thereby much impaired, for the fewer Traders be, the less will be both
exported

exported, and imported, and whatever lessens export and import, lessens doubly his Majesties Customs, of the which these are two hands. 2. Other Nations who understand Trade in its perfection, such as *Holland*, do allow all their Subjects to Trade without difference, and it is a Maxim amongst them, *That many hands and many Purses, make a rich Trade*. And it imports not to say, th t their Common-wealth differs from ours in its Constitutions, and that they have vent for their Commodities all over *Europe*; whereas our vent is no larger th n ou consumption; for whatever difference be in our fundamentl Constitutions, yet in the matter of Trade, they are still the universal Standart: and sure, it is the vantage of our Countrey, even in order to our Consumption, to have the priviledge of Trade, in necessar Commodities extended to all, for the moe Importers be, we will get our necessar Commodities at a lower rate, and the moe Exporters be, our Corns, Fishes, &c. will give the greater rates, and those are the two great advantages of a Kingdom.

I confess (may it please your Grace) that the erecting of Societies, as to some Trades, and at some times, is necessar, but the ordinar rule extends there, no further, than that Trading to remote Nations, and in rich Commodities, should at first have some Priviledges as to their erections, for else, privat Stocks would not be able to compass it; but even as to these, when the Trade is once secured, and becomes easie, and managable, then these priviledges cease, with the cause from which they had their origine: and therefore it is, that albeit Trade with
For-

Forreigners seem'd at first above the reach of our Traders, when to sail to *Spain*, seem'd as hard as an *East-India* Voyage now doth, then Trade needed some priviledges; yet now, when experience and encrease of Money has lessened those difficulties, I conceive the priviledges should expire. It is known, that the Bishop of *Glasgow* gave only his Burgh then liberty to Trade into the Shire of *Argile*, and that the Burgh of *Edinburgh* had a special priviledge of old, to Trade in the *Isles*: But that now they need these, will not be debated even by themselves.

I confess, that all Incorporations in a Common-wealth ought to have different designs, and different priviledges suitable to these designs, as is pretended; but it can by no clear inference be deduced from this, that the sole liberty of Trading in all Commodities with Forraigners, should belong to Burghs, but only that they should have some Staple-goods, wherein they only may Trade. And we are content to allow them the exporting and importing of what is superfluous, such as Wine, Silks, Spices, &c. let all, even Countrey-men, have the export and import of what is necessar for their own station and imployments, let them export Corns, Cattel, &c. since the having these Commodities signifies nothing without power to sell them, and the liberty of importing Timber, Iron, Salt, and these other Commodities, without which they cannot live in their own station. And whereas it is pretended, that they are content we should export the natural product of our own Countrey, providing we bring home Money only for them, it

it is conceiv'd, that this Concession destroys what is conceded, for if Unfree-men can only bring home money, then Free-men and Burgeſſes may eaſily underſel them, for few abroad buy them with ready Money, and Money is the deareſt of all returns; ſo that theſe who barter Commodities for what they export, may ſell much ſooner, and cheaper, if they bring home nothing in return of what they export; for export by it ſelf, without import, occaſions great loſs, and the advantages of Merchandizing is ordinarily in the returns.

Whereas it is contended, that the leſs diſcuſe Trade be, it proſpers ſo much the better, for it may be eaſier govern'd according to the juſt rules. And our old Law appointed wiſely, that none but Worſhipful men, and men of conſiderable Stocks ſhould Trade abroad, that thereby poor people, by running over Seas, might not by their neceſſity of ſelling, or want of ſkill, low the prices of what they exported, and buy unſkilfully at high rates what they imported; and that to defend Trade againſt this diſhonour and prejudices, Guildries were appointed in Burghs to ſuperviſe the conduct of Merchants, and reſtrain abuſes, which Burghs of Regality and Barony wanted, and ſo were lyable to many eſcapes.

To this it is answered, that though at firſt, theſe rules were neceſſary, yet now when Trade is raiſed to ſome conſiſtency, this neceſſity fails with its occaſions; for there are no where poorer Traders, than within Burghs, to which ordinarily the meaneſt and pooreſt among the people retire, when they cannot live elſewhere, and
when

when they are once settled there, they, because of the easie conveniences of Trading, do indiscreetly run upon it; whereas, none who live either in Burgh of Regality, Barony, or in the Countrey, will be tempted to adventure upon Trade, except they have considerable Stocks, and be secure of a full vent. And without debating, what was the design of our Legislators, in erecting Guildries? yet we now find by experience (which is a much surer guide than project) that Guildries have conduced so little to advance Trade, that they tend rather to secure the Monopoly, which they at first procur'd, and to establish by mutual compacts, those exorbitant prices for Commodities, which are now exacted: And if Deaconries amongst Malt-men and others, were discharged, to prevent Combinations, I see not why Guildries, which are but Deaconries amongst Merchants, should not be discharged for the same reason.

But (may it please your Grace) the great refuge against these convincing Reasons, is, that these might have been urg'd, *in jure constituendo*, but not *in jure constituto*, for Reasoning ends, where Law begins, & *omnium quæ fecerunt majores nostri, non est reddenda ratio*. But this may, I humbly conceive, be easily answered, if we consider, 1. That Laws are mortal like their makers, and they who would bind up their reason to a constant adhering to what was once made a Statute, behov'd to renounce that reason by which they should be govern'd, and leave off to be reasonable men, that they might be Lawyers: and therefore it is, that because Legislators

tors might take an untrue prospect of future events, Lawyers have determin'd, that where Laws never grew unto observance, they did really never become Laws, the being once observ'd is one of the great essentials of a Law, *Statuta usu non recepta, nec observata, pro non factis, reputantur*, Voet. de Statut. cap. 2. Sect. 12. arg. l. 1. §. 9. C. cad. toll. & alex. consil. 6. vol. 1. And if the not observance of Laws for ten years after they were made, is in the opinion of Lawyers, sufficient to repudiate them, much more ought they to be rejected, after they have for many hundreds of years, languished in a constant contempt; for else they are but like these Idols, of which the Scrip ure tells us, that they had eyes, and saw not, ears, and heard not, and feet, but could not walk; And if we consider these Laws, we will find, that even Authority of Parliament, which can do all things in Scotland, has not been able to maintain them in these; for these Statutes oftentimes begin, *That for as much, as there had been divers Acts of Parliament, made in favours of the Royal Burghs, ordaining they should have the only benefit of sailing abroad, &c.* Yet these Laws have not been in observance, therefore, &c. as is very clear by the Narrative of the 152. Act. 12. Par. J. 6. and why should the Act have been renewed so oft, if the former had been observ'd? And if in spight of all these Acts, the subjects could never be brought to compliance with them, why should we offer so much violence to our Native Country, as to force upon them that from which they have so much aversion? If Acts which have been strengthened by obedience and observation,

may

may be repelled by desuetude, and a contrary custom, how much more may desuetude overcome Acts which are not yet arriv'd at their due strength, and perfection? 2. Though these Acts had once been in observance, yet they are now antiquated by desuetude, and non-observance: That desuetude may antiquat and abrogat Laws, is very clear from reading our Acts of Parliament, of which the full half are in desuetude, and are only considered now by us as matters of Antiquity, as Roman Meduls, or old Histories: and particularly, can the Burghs-royal deny, but most of these Acts limiting their Trade and Government, are gone in desuetude, as that Officers within Burghs should not be continued from year to year, J. 3. Par. 5. Act 29. They should not sail in Winter, nor ofner than twice in the year to Flanders, J. 5. Par. 4. Act 30. Nor should they sail, except they be Worshipful men, and have at least three Serplaiths of Wool, or half a Last of Goods, J. 3. Par. 2. Act 13. J. 2. Par. 14. Act 168. *Frustra opem Legis implorant, qui in Legem peccant*: And it were unjust, that they should oblige others to obey, what they will not submit to. And that the Acts whereupon the Priviledges now craved, are founded, are gone in desuetude, appears very convincingly, from the constant practice of all the corners in the Nation, not by single, or clandestine Acts, but openly, upon all occasions, and in all places, and ages, even under the Neighbouring observation of whole fleeces, and of all their succeeding serieses of Magistrats: Have not Musselburgh, and Burroughstounness near Edinburgh, Hamiltoun near Glasgow, the greatest Burghs

Burghs of this Kingdom, exercised this freedom which is now controverted? And though they made frequent applications to your Lordships, yet till now was there never a Decree in favour in their favours, and Decrees in absence, are rather founded upon the omissions of the Defender, than the justice of the Pursuer. So that it appears clearly, that the Magistrates have been ashamed to crave, the Judges unwilling to allow, and the people stiffly refractory from submitting to the priviledges here craved to be declared.

To this it is replied for these Burghs-royal, that desuetude cannot abrogate Laws under Monarchies, though it could under Commonwealths, *Nec potest tacitus populi consensus abrogare, quod expressus populi consensus non introduxit, l. 32. ff. de leg. Nam cum ipsæ Leges nulla ratione nos teneant quam quod judicio populi sint receptæ, merito & ita quæ populus sine ullo scripto probavit, tenebunt omnes.* 2. Though desuetude might abrogate Laws as respect only private Rights, yet the people by breaking penal Statutes, cannot by repeated Transgression, secure themselves against Laws made for restraining their insolencies; else by frequent Usury, or attending Conventicles, these delicts might pass in desuetude, and by the Acts founded upon, the half of the offenders Goods are declared to belong to his Majesty, and these Laws are in effect penal Statutes. 3. Where Laws may run in desuetude, it is required, that the desuetude or contrary consuetude, be founded upon clear and open deeds, and not upon clandestine or precarious Acts, as in this case, wherein all the Trade with Foreigners,

reigners, to which these Burghs-royal or of the Barony can pretend, was either carry'd on under the name of free Burgesſes, or was tolerated by the neighbouring Burghs-royal. 4. It is required, that the conſuetude which is oppos'd to Law be *judicio contraditorio vallata*, which cannot be alledg'd in this caſe, where not only no Decree can be inſtanced, finding theſe Laws to be a rogated, but where there are Decrees produced conform thereto.

To the firſt of which it is answered, that though theſe Laws ſeem to reſpect a Common-weal yet it is generally received now, that a contrary deſuetude may abrogat even Laws introduced by Monarchs, and that the Taciturnity or conſent of the Prince, is equivalent to a conſent. Thus *Perez, tit. Quæ ſi long. conſuet. ſunt qui ſententium principis deſiderant, quia in illum omnis poteſtas condendi juris tranſlata, ego tamen exiſtimare ſufficere, ne Princeps contradicat*: and for this he cites, *c. 1. de conſtitut. de 6.* where a conſuetude is ſuſtained to abrogat Law, though the Pope (who is a ſovereign Prince in his own dominions) did not expreſſly allow it, *dummodo ſit rationabilis & legitime præſcripta*; and with us, do not our old Laws die out by deſuetude? and do not new conſuetudes daily ſpring up, without any other warrant, than meer reaſon, and preſcription: but in our caſe, His Maſteſty has ſo far allowed this cuſtom, and has ſo far contributed with it to the abrogation of theſe Laws, that he has under his own Royal Hand, granted many Signatures in favours of Burghs of Regality and Barony, allowing them to Trade with Forreigners, and extending their priviledges as far as

thoſe

those of Burghs-royal; which Signatures are passed in His Exchequer, and authorized with His Seal, which states this consuetude in a very different case from consuetudes which may abrogat penal Statutes, or such publick Laws as are made against Conventicles; the one His Majesty opposes, in the other He concurs. And this likewise answers that other Objection founded upon the clandestineness of these Acts, for what Act can be more publick, than these which pass His Majesties hand, the publick Judicatures, and common Seals; and as to extrajudicial Acts, contrary to the Laws, they have been too many and universal to be latent; but it is offered to be proven, that Burghs-Royal and Burghs of Barrony, have been in use openly and avowedly to drive on this Trade, which they endeavour to maintain. And whereas it is alledged, that *consuetudinis non vilis est autoritas, verum non usque adeo sui valitura monento, ut aut legem vincat, aut rationem, l. 2. C. que sit long. consuet.* To this some Lawyers answer, that though it cannot over-power a Law, whilst the Law stands, yet it can abrogat and make the Law fall, *Cont. ad dict. l.* and others interpret so this Law, as that they extend it only to a growing and unripe consuetude, which cannot indeed abrogat a Law, that has not fully lost its vigor, as *Cujac.* and others affirm.

As to the fourth Objection, it is answered, that a contrary consuetude can abrogate a Law, *sine iudicio contradictorio*; for, *iudicium contradictorium* is not that which abrogats the Law, but only finds that the Law is thereby abrogat, and

it doth not strengthen, but declare the consuetude; and the Lords of Session, by refusing frequently to declare this Priviledge, have therein done what was equivalent to a *judicium contradictorium*; and if this be not sustain'd, then the Burghs-Royal may crave, that all the Lieges may be debarr'd from tapping Wine, Spices or other things, absolutely necessar for the accommodation of Travellers; for the selling of those is as expressely prohibited by the Law founded on, as is the trading with Forreigners. Nor is the consuetude whereby these are abrogat, any other ways *firmata judicio contradictorio* than this is; and though the Burghs-Royal declare, that they insift not at this time to have their Priviledges *quoad* these extended, yet certainly when they have prevail'd in the one, they will crave the other. And what an absurd thing were it, that all Travellers behoved either to lye in Burghs-Royal, or to want the accommodation which is necessar, or to buy at exorbitant Rates; and that not so much as a Candle or Penny-point should be sold, for the conveniency of the Countrey, outwith a Burgh Royal.

I may likewise represent to your Grace and Lordships, that His Majesty is not only, because the Author, therefore the absolute Arbiter of this Priviledge, and may dispose upon what he hath given; but that likewise by the 26. Act of the 3. Session of His Majesties first Parl. it is declared, that His Majesty has the sole Prerogative, of ordering and disposing Trade with Forreigners; and therefore, since His Majesty

has granted to all Burghs of Regality, and many Burghs of Barrony, as full liberty in trading with Forreigners, as He hath granted to any Burghs-Royal, I see not who in Law can dispute this Priviledge with them; at least, how the Burghs-Royal can in gratitude debate the existence of a Priviledge with their Prince, who at first gave it. Nor can these concessions, in favours of Burghs of Regality and Barrony be alleged to be subreptitious, as is pretended, since they are not only past in the ordinary way, but are frequently past, & *actus geminus facit actum censei non esse subreptitium*; but likewise, after it hath been represented to His Majesty from the Burghs-Royal, and their Agents in Court, that this concession was contrary to the Priviledges granted to them by the Parliament, notwithstanding of all this, His Majesties Predecessors and Himself have still continued to grant these concessions. And that the Burghs of Regality and Barrony have enjoyed this Priviledge of Traffique and Merchandizing, is very clear by the 29. Act, II. Parl. 7. 61. wherein it is declared, *That for so much as divers Burghs of Barrony and Regality were use to exerce the Trade and Traffique of Merchandize; therefore, that Priviledge and Freedom shall be continued to them.*

It hath been oft inculcat, that this Priviledge granted to the Burghs-Royal, of the sole Trade with Forreigners, is not the meer effects of His Majesties Favour, and is not only founded on the Parliaments concession, but that it is

granted to them, upon the account they pay the sixth part of all the Publick Impositions of this Kingdom, which makes their Contributions within Burgh to rise so high, that if they had not this Priviledge to ballance that inconvenience, they would not be able to ease the Countrey, by paying so great a proportion, and if Burgessees within Burgh had no special Priviledge above others, they would not live within Burgh; For, it were unreasonable to imagine, that when they might Trade as well elsewhere as within Burgh, that yet they would continue to live there, under great Burdens, and without any Priviledges.

To this it is answered, that the III. Act of Parliament, *Ja. 6. Par. 11.* whereby it is declared, That their part of all general Taxations shal extend to the sixth part allanerly bears no such quality; nor do the Acts of Parliament bear any such onerous Cause; But the true reason of their bearing the sixth part of the Kingdoms Burdens, is, because they are intrinsecally the sixth part of the Kingdom, if we look either to the number, or riches of their Inhabitants: and if the Burghs-Royalty were accounted the sixth part of Scotland, under the Reign of King *James* the first, how much more great a proportion are they able to bear now, when the Burghs are six times more numerous, and each particular Burgh six times more rich and populous, than they then were. Their Riches have encreased with our Luxury, and the Luxury of our Age doth far exceed what it was in that Kings time; So that sin

now the Nobility and Gentry only toil to get money, to buy from Burgesſes what they import from Forreign Countries, I conceive thoſe Burghs may eaſily bear a ſixth of our burdens, ſince once a year they get in all our Stock. And to any thinking man, it may eaſily appear, that all the Money in *Scotland* doth once a year circulate and paſs thorow the hands of Citizens: For money ſerves only either to pay our Annual-rents, or buy us neceſſaries; and that which is paid for Annual-rents, is by the Receivers given out to others, to ſatiſſie the preſent neceſſities, and all is ultimatly employed for Food or Rayment, and little money is beſtowed upon Food or Rayment in *Scotland*, except only within Burgh.

Since then this Priviledge doth divide *Scotland* in two parts, ſince equity in it ſeems to propoſe Law, and ſince both Parties pretend to equal Advantages: I ſhal humbly move, that if this Illuſtrious Senat be unwilling to interpoſe in ſo univerſal a Difference, that this Debate ſhould be tranſmitted by them to the Parliament, which is the full Representative of all the Kingdom, and the natural Judge of equity and convenience.

The Seſſion-referr'd this Caſe to the Parliament, who extended this Priviledge to all the Lieges.

For the Earl of Northesk, against
my Lord Treasurer-Depute.

TWELFTH PLEADING.

*Whether a Novo Damus secures against pre-
ceeding Casualties.*

My Lord President,

IT is one of the chief Advantages of our Na-
tion, in this Age, that we live under a Prince
who covets more the hearts of his Subjects
than their Estates; and who loves rather to see
his Laws obey'd, than to have his Advocat pre-
vail: What measure then can his fisk expect
when in general, all Lawyers have even under
Tyrants delivered, as their opinion, *semper con-
tra fiscum in dubio est respondendum?* And since
flattery or fear may encline some, to favour the
Princes Interest too much; it is fit, that Judges
should be jealous of their own spirits in such
cases, and should bend them, rather to the o-
ther side, that they may fix at last in a straight-
ness.

The case proposed is, whether the *Novo da-
mus*, not expressing the casualty of Marriage
specially, but all Casualties in general, doth by
our Law, defend against the Marriage?

That it doth, I press for my Client, upon
the

these Grounds; First, a *Novo damus* is that, which the Feudalists call *renovatio feudi*, and *renovatio feudi* doth import, *liberationem ab omni caducitate*; nay the very nature of a Disposition or Alienation doth imply, a liberation from any burden, with which the Disposer could affect it, else he should alienate and yet retain, give and not give; and therefore, by the civil Law, he who disposes Land, was interpreted to have disposed it *tanquam optimum maximum*, free from all the Disposer could lay to its charge.

If any person should dispoſe his Land to me, and ſhould thereafter crave a Ward or Marriage, as due out of theſe Lands *tanquam debitum fundi*; certainly it would be an abſurd purſuit, and I would be abſolv'd; nay, if a Superior enter me to my Lands, *eo ipſo*, I am free from all preceeding casualties; nor did ever a Vaſſal take Diſcharges at his entry of any former casualties, but his entry was always judg'd ſufficient; why then ſhould not His Maſteſties Vaſſals be in the ſame condition? for ſince this is clear in other Vaſſals *ex natura feudi*, there being no Statute in their favours, it muſt be due to all Vaſſals; for, *a quatenus ad omne valet conſequentia*; and that which is natural to Few's, muſt be inherent in all Few's. The deſign of a *Novo damus* is to ſecure the receiver againſt nullities; the Law thought to ſet this as a March-ſtone, and let not us remove it. The ſtile of a *Novo damus* in our Law, which is equivalent to exprets Law, is very exactly adapted

ted to this design, as may appear by all its Clauses; for, when His Majesty *de novo* dat, that Chartor must be equivalent to an original Disposition; and sure, if these Lands had belonged to His Majesty, and if he had disposed them, that original Right would secure the receiver, against all His Majesty could crave out of these Lands, except in so far, as he did expressly reserve at the making of the Disposition: nor do I see, why reservations of former Rights were necessary in Dispositions, if these Rights were reserved without them, and if they were not cut off by the Alienation it self.

But, not only doth this *Novo damus* dispose in favours of my Client, the Land out of which these casualties are sought, but it disposes them, *cum omni jure, & titulo, interesse & jurisclemeo; tam petitorio quam possessorio, quæ nos, aut predecessores, aut successores nostri, habuimus, habemus, vel quovis modo habere possumus, in, & ad, dictas terras.* What can be more express? For if His Majesty had any claim to, or right in, these Lands, any manner of way, he here disposes it, and transfers His Right, in, and to my Client; if His Majesty have any Right at all, it must be *vel jus, vel interesse, vel jurisclemeum*, and if it be either of these, it is disposed: But lest it might be pretended, that this Clause extended only to secure the Property (which is not its only effect, as I shal clear hereafter) Therefore, the stile of a *Novo damus* bears *omne jus, non solum quoad aliquam ejus partem, sed & ad omnes cen-*

ius, firmas, & proficua, ratione wardæ, purprestura, foris facturæ, non introitus, escheta, &c. vel quocunque alio jure, vel titulo: For which general Clause, I draw these Inferences; First, that this general Clause must seclude His Majesty, since *tantum valet genus quoad omnia, quantum species quoad specialia*, Bald. consil. 1. lib. 3. Gemin. consil. 65. & l. si duo ff. de administ. tut. And therefore, since a special Gift of this Marriage would have secluded the King or His Donator, a general concession must do the same, especially since this general was designed to secure against all, in respect particulars could not be remembered: even as we see in general Discharges, or Renunciations, which are as valid *quoad* all, as any particular Discharge can be, as to a special debt or deed; and since this general Discharge of all former Casualties, is so oft repeated, and represented under so many various Terms, which can signifie nothing, if they did not express the exuberant Will and Inclination of the Prince, to denude himself, and secure his Vassal, against all former Casualties, as well Marriage as others: and this Clause is equivalent to that Clause spoken of by the Doctors, *quovis modo valet*, which comprehends *omnem modum vacandi, & omnes formas excogitabiles renunciationis*, Cap. consil. 14. 2. General Clauses subjoyned to specials enumerat, must be extended at least to all such specialities, as are of the nature of the specialities enumerat; For, the subjoyning a general to specials, is designed to supply the

not enumeration of other specialities which are homogeneous, *clausula generalis quæ sequitur eius speciales enumeratos, extenditur ad similia specificatis*, Socin. consil. 316. But so it is, that the casualty of a Marriage is of the same nature with many casualties here specifically expressed such as Ward, Non-entry, Escheat, &c. to which the Superior having right in the same way as he has to Marriages, it is presumed, he would discharge it in the same way with them.

3. General Gifts must be extended to such particulars, as probably the Granter would have gifted if they had been expressed; but so it is, that it is beyond all doubt, but, that His Majesty, if he had been asked, whether he was content to dispoise and gift the Marriage, he would have consented very freely to gift the Marriage, as well as the other Casualties, this Marriage must therefore pass under the general; and how can it be thought, that he who granted all other Casualties, would have refused this or what speciality was there in this Casualty, which might have occasioned this refusal? *Nam generalis clausula idem operatur, quod specialis, ubi non subest ratio diversitatis*, Curt. consil. 19. and upon this ground it is statute, that general clauses in Remissions, shall be extended to all crimes of less gravity, than the chief crime which is expressed, Act. 62. 7. 4. Parl. 6. and if great crimes can be taken away by general clauses, sure it cannot be denied in civil Casualties, which are of their own nature easier pardon'd, and of less consequence: and by that Act, it is clear, that the general clause was ex-

extended formerly to all, even greater crimes than the crime specified; and if a Statute was necessary there, it is much more necessary here, as the general clause cannot be restricted. Sure he who granted the Property, would not stick at a Casualty, he who granted the greater, would not stick at the lesser; he who granted so many Casualties, would not stick at one; he who granted all others of the same nature, would allow this to pass with its fellows; and he who granted Ward, which is the cause of Marriage, would not have refused, to grant the Marriage, which is but an effect and consequent of that Ward: And this leads me into another Argument, upon which I lay very much weight; His Majesty has here gifted *omnia proficua & devoria que contigerunt ratione Wardæ*; but so it is, that Marriage is a Casualty *proficuum & devoria*; which falls by reason of Ward-holding: and so *contingit ratione Wardæ*; for, Ward here is taken not as a naked Casualty, but as a holding, and therefore it is, that when by the stile of a *Novo damus*, all Casualties are enumerated, Marriage only is not specified in the old Signatures, because that Casualty was still looked upon, as comprehended under the general, *omnia proficua ratione Wardæ*. Not only do many general terms of this *Novo damus* secure against this and all other Casualties, but His Majesty in his concession, expresses all the ways of transmission, whereby these Casualties could be given by him to his Vassal, *viz. Renuntiando, transferendo, & extradonando eadem, cum omni actione & instantia*: and in contemplation of this

his Right, His Majesty has a considerable composition in Exchequer, which makes this to be not only a Gift, but a Bargain, not only meet Law, but Equity.

To ballance these Reasons, it is represented for His Majesty, and his Donator, that all his Majesties concessions are gratuitous, and must not be too largely extended, for what compositions are payed, are rather payed as fees to His Majesties Officers and Attenders, than as a price, and these are too low, and unproportionat, to what is given, to deserve that name.

2. That His Majesty cannot be prejudg'd by the negligence of his Officers, and what he passes in favours of his Vassals, deserve a far other construction, than what is done by other Superiours; and though general Clauses may carry away Casualties from them, because it is presum'd, that they have leisure to ponder every word, in any Right they grant, yet His Majesty being loaded with the weighty affairs of the Nation, cannot vaick to so exact observations; and therefore it was thought fit, that the negligence of His Officers, nor the importance of Parties, should not prejudice Him.

3. That the gift of a Ward, *per se*, would not carry the Casualty of Marriage, if it were not exprest; *ergo*, Marriage could not be comprehended, under the Casualty of Ward which is here exprest.

4. That general Clauses are in many cases but *error stili*, and are restricted by the decisions of all our Courts; thus though the stile of a Gift of Escheat, doth dispoise all moveable

moveables which the Rebel had, or shalacquire; yet, these Gifts are restricted by our decisions, to what the Rebel had, the time of his rebellion, or should acquire within a year after the rebellion; though Gifts of Ward and Marriage bear, ay and till the entry of the next lawful Heir, yet these Gifts are restricted to three terms Non-entries, subsequent to the Ward; and though Gifts granted do bear *relief*, yet they would not carry a right to the *relief*. 5. That the design of a *Novo damus* is to secure the Property, but not to transmit a Right to any Casualties not exprest; and thus the King might, notwithstanding of a *Novo damus* crave bygone Few-duties; nor would it debar His Majesty from craving Taxt-wards or Marriages, as was decided in the case betwixt His Majesties Advocate, and *Pierstown*, where it was found, by the Exchequer, that Marriage was not comprehended under the *Novo damus*, because it was not exprest.

I am not, my Lords, willing to lessen His Majesties Favours to His Subjects, who were not worthy of them, if they undervalued them; and therefore, I beg leave rather to magnifie them so far, as to think, that they should not be interpret so narrowly, as to bear a proportion to our deserts, (for the favours of Princes cannot, like his whom they represent, be merited) but so augustly and opulently, as may bear a proportion to the greatness of him who dispenses them, as *Clarus*, and all the Feudalists observe; and if the word can admit a large
inter-

interpretation, the grants of Princes ought to have it; So, that since these general clauses would carry all Casualties in Gifts granted by privat Superiors, much more ought this to be allowed *in angustioribus principum concessionibus*, especially in Discharges granted by them of all former incumberances, which being of the nature of Indemnities, ought like them to be interpret all possible ways to defend the poor Vassal. Nor do I deny, but the negligence of His Majesties Officers should not prejudice His Interest, yet, Gifts granted cannot be called negligence; for the one is an omission, and the other a commission: the one is a privation, and the other a positive Act; the design of that Statute was to defend His Majesty against the omission of His Officers, such as the suffering His Rights to prescribe, or omitting to propound Defences for him; and the words of the Act 14, Par. 16. Ja. 6. are, *that in the pursuing or defending any of His Actions or Causes, the negligence of His Officers omitting any exception, reply, &c. shal not prejudice him.* But God forbid that every Gift granted by His Majesty, and past by his Exchequer, might be thereafter questioned, because a sufficient composition was not payed, or that it was not founded upon a sufficient cause; for else, all our Signatures and Rights might be questioned; this were to unhinge all our Securities, and to endanger all His Majesties Officers; but how can what is past His Royal Hand, be thought to be past by the negligence of His Officers? And how impertinent were it, for his Officers always to stop what His Majesty commands?

I confess, that the Gift of a Ward *per se* would not carry Marriage; but if His Majesty did grant *omnia proficua ratione Wardæ contingentia*, though in a single Gift, I think it would give right to the casualty of Marriage; and yet, that case would not be so strong as ours; for in single Gifts, it is proper to express Casualties dispoⁿd, but in a *Novo damus* it is otherwise; for the design there, is by the enumeration of all special Casualties, and by subjoining a general to these, thereby to secure against all these Casualties.

To what is founded upon the errors, that are in many of our Stiles, I need only answer, that *regulariter stilus æquipollet juri, & pro Lege habetur, l. si quando C. de injur. Bart. in l. peritos ff. de excus. tut.* And therefore, though as Laws may be abrogated or restricted, so Stiles are subject to the same frailty; yet, unless it can be made appear, that these Stiles are restricted by the constant current of Decisions, or by some express Laws: certainly, Stile must rule us: Stiles are the product of common consent, and are introduced after much experience, by such as understand: they are to Lawyers, what the Cart is to Geographers, or the Compass to Seamen; and this is so far from being convell'd, that it is established by the instances adduced, of Gifts of Escheats and Non-entries, which were restricted according to the latter, till they were restricted by express Acts of Exchequer: and sure these Acts had been needless, if the Stile had not been binding, before these Statutes drawn backwards, but having a future obli-

bligation only, every man knew how to com-
pone or transact for them accordingly.

As to the instance of Reliefs, by-gone Few-
duties, Taxt-duties of Ward and Marriage (which
was *Pierstons* case) it is clear, that the reason
why these pass not under general Gifts is, be-
cause they are liquid, and so cannot be com-
pon'd for, in Exchequer, as *Hope* well ob-
serves, for these are no contingencies; and
since the Law gives right to any thing in a Sig-
nature, because it is compounded for; there-
fore, in justice these things cannot be compre-
hended in a Signature, which are not compound-
ed for. We have likewise an express Act of
Parliament, appointing that Reliefs should not
be compounded for, which draws out these
from the common objection, and states Reliefs
in a case far different from ours.

And though it be much urg'd, that His Ma-
jesty having taxt the casualty of Ward and
Marriage in this Gift, it is most presumable,
that He would have express'd the casualty of
Marriage, if he had designed to have transmit-
ted it, since that casualty was then under con-
sideration: Yet, this is but a remote conjecture,
and must cede to the stronger presumptions
urg'd in the contrair; and since the Signature
is not drawn by His Majesties order, but by the
Vassal, the presumption ceases; and it is
more presumable, that the Vassal would have
express'd this casualty, had he thought it ne-
cessar: and whatever might be urg'd, if this
casualty of Marriage had been express'd, but had
been delet; yet there can be little difficulty,
where

where the Signature was presented without it, and where the Vassal rested upon the general Clause.

All the Lawers of our Nation have advised, that this *Novo damus* did seclude Marriage, though not exprest; all the people have esteem'd so, and upon that esteem, they have bought and sold accordingly, Rights carrying such a *Novo damus*; So that whatever may be done as to the future, yet since so many have compon'd with His Majesty for such Gifts, in contemplation they carryed all Casualties, and that so many have given considerable sums to such as had compon'd for them, upon that consideration; Since this opinion was so old and universal, and since ignorance in it (if it be an error) was so invincible, being warranted by the advice of the ablest Lawyers; I cannot see how in Law *quoad preterita* it can be otherwise interpret, whatever fare it may have for the future.

The Lords found, that a Right granted by the King, with a Novo damus, did not only secure the Property, but secluded all the Casualties that were exprest; but that it did not defend against Casualties which were not exprest.

For

For JOHN JOHNSTON

Against

JAMES HAMILTON.

XIII. PLEADING.

*Whether a Contract entered into by a Minor, who
averr'd himself to be Major, and swore never
to reduce, be revocable.*

THE Law might seem a severe Master
if it only impos'd upon us what we
were to obey, and exacted from us a
intire submission to what it did command: but
in recompence of our submissions, it returns
its protection; it doth supply want of strength
in the weak, when they are engaged against the
strong; want of wit in the simple, when they
are engaged against the subtile; and want of
age in Minors, who would otherwise be very
easily circumveened: it appoints its Judge to
be their Tutors, and whilst such as rely upon their
own wit, may be circumveened, they are by its
assistance plac'd beyond all hazard.

Amongst those other Minors, who daily come
to crave from you, the reduction of what they
did in their Minority, none was ever more fa-
vourable than my Client, he being a person, who
because of the lowness of his parts, and mean-
ness of his breeding, is like to continue very
long a Minor. And if sharpness, & malitia, can
in some cases forestal Majority, and almost meet
it half way, certainly want of wit and ordina-

saga

sagacity, should extend the priviledge of Mi-
 nority. The person by whom he is lās'd being
 his own Kinsman, and one in whom he confi-
 ded very much, pleads likewise for a more li-
 beral reparation, and the same principle which
 makes murder under trust to be treason, should
 likewise make the lāsion here to be more easily
 reparable, and should not only weaken the De-
 fences, but should likewise be a sufficient ground
 to repell such as were of themselves relevant :
 and the lāsion here, is not one of these small
 injuries, but is a great and considerable loss,
 wherein the Minor has not only been induced
 to sell his Land, though the Law appoints, that
 a Minors Land should not be sold, but by the
 Authority of a Judge; but to sell his Fathers
 Heritage, transmitted to him by a long *series*
 of Ancestors, and to sell it too without the con-
 sent of his Curators, who are the only persons
 who should defend and supply his infirmity.

Against these Reasons, it is debated for the
 Defender, that though Minors have great Pri-
 viledges allowed them in Law, yet many causes
 may occurre, wherein it were unjust to propor-
 tion exactly the prices of what they sell, with
 the ordinar prices of what is sold; and the same
 equity whereupon their Priviledges is founded,
 may make such exactness, not only to appear
 to be, but really, to be rigour. As if a Minor
 should, to free him from the Gallies, oblige
 himself to sell Land at an easie purchase, to one
 of his own Countrey-men, who were then in a
 Forreign Countrey with him, & from whom he
 could only expect money, and which money
 being

being to be bestowed upon Merchandize in these Countreys, might produce far greater advantage to the Merchant, than the Land could which, and many other instances, may clearly evince, that if Minors had not some way whereby they might secure such as would contract with them, the Law would secure them, but as it doth Prisoners, and which was designed to keep them free, would take their freedom from them; and therefore, the Law has introduced, that Minors being in *consensio majoritatis* may subjoyn an Oath to their Contracts; which Oath is, because of its divine Character, and of the reverence that's due to that great God who is called upon as witness in it, by all Christian Lawyers declared to be sufficient to insure and corroborate the Contract to which it is subjoyn'd. For, the Law of God obliging every man to observe what he has sworn, even though to his prejudice, it were unfit that the Laws of men should be more binding than those. Likewise, by the common Law, *l. 1. c. si adversus venditionem*, an Oath confirming Vendition is declared binding, *Nullam te esse contravenientem, neque perjurii me auctorem tibi fatu sperare debuisti.* And authent. *Sacramenta pœberum sponte facta, super contradictibus rerum suarum non retractandis, inviolabiter custodiantur.* Which is likewise observed by our Law, the last of February 1637. and by a late Decision, February 10. 1672, Mr. George Wauch contra Barly of Dunraggat. But not only has this Minor obliged himself upon Oath, not to revoke, but

he hath likewise declar'd upon oath in the same
 Bond, that he was Major, and Majority being that
 which cannot be known by the eye, and there be-
 ing no liquid and present proof of a Minors age,
 the Law should have prejudg'd Commerce very
 much, if it had not allow'n that a Minor asserting
 himself to be a Major, should notwithstanding
 be restor'd against his own declaration: for by
 this, not only should Minors be disabled from
 getting Money to do their necessary affairs, but
 few se Majors behov'd still to wait till they
 should get an exact probation of their Age; which
 probation is very difficult with us, where there
 are no certain Registers: and consequently,
 Majors might, because the probation of their
 Majority could not be presently instructed, be
 very much prejudged, and sometime the pro-
 bation of Age, being that which cannot appear
 convincingly to the sight; and that being a
 case, wherein such as contract with Minors might
 be cheated, it was very just, that since the Law
 designed only to assist Minors that were cheat-
 ed, that it should not give the same privilege
 to such Minors as cheat others, by asserting
 themselves to be Majors, *l. 2. Si min. se ma-*
ior. dixerit. Si is qui minorem nunc se esse ad-
vererat, fallaci majoris etatis mandacio eo dece-
rerit, cum juxta statuta juris, errantibus non e-
riam fallentibus minoribus publica jura, subveni-
unt, in integrum restituti, non debet. And since Dio-
 clesian, who was not only no Christian, but a
 persecuter of them, did bear such respect
 to an Oath, what respect ought it to have
 from

from Christian Judges, who if they suffer this Oath to have no effect, are the occasion that the Name of God is taken in vain.

Minors may be punished for perjury, falshood, and cheating, and therefore, it follows necessarily, that they much more be bound by Oaths; for it were unjust to punish them for perjury, if they understood not perfectly the strength and efficacy of an Oath, and if they do understand that, there is no reason to absolve them from it: and if it can bind them to severe and corporal punishments, it can bind them much more to the performance of civil Contracts.

Nor can it be deny'd, but that our Law respects so much an Oath, and finds it so obligator, that deeds done by Women in favour of strangers, *stante matrimonio*, are null, though ratified by an Oath, as was decided 18 February 1663, *Brisband contra Douglas*; at which time the Lords were of opinion, that all obligations which are *ipso jure* null, such as obligations made by Women *stante matrimonio*, and by Minors having Tutors and Curators, but without their consent, are still null, though they be ratified by an Oath: and if this be true, as is acknowledged, they contend, that there is no reason why all Contracts entered into by Minors should not be valid, for the obligation of an Oath lyes in the hazard of perjury, and in the religious respect which Lawyers have to Oaths, and in point of Conscience, what difference is there betwixt Contracts *ipso jure* null, or such are not so? God takes no notice of such subtle differences, and since the Oath is the same in both

both, why should it not produce the same effect?
 It is the Oath which in this cases obliges, and
 therefore, though the Contract were null, yet
 the Oath still binds, and subsists, though an-
 nexed to an null Contract, even as a null Con-
 tract may be ratified, or homologated. And
 that Contracts upon Oath, do bind Minors, tho
 they have Curators, and though they subscribe
 without their consent, is maintain'd by most
 famous Lawyers, as *Andrelus, contravers. 202. Est*
in hac opinio (inquit ille) fundata in religione
juramenti, quæ semper militat, siue minor habeat
curatorem, siue non, & consequenter cum religio ju-
ramenti, & odium perjurij in utroque militat casu,
in utroque etiam debet manere effectus. Other
 lawyers assure us, that *juramentum Minorem,*
representat Majorem, and therefore, since Majors
 are bound, and Minors swearing are Majors in
 the construction and interpretation of Law, Mi-
 nors swearing should be also tyed by these Con-
 tracts. Nay some have said, that *juramentum*
non obligat Minorem non habere Curatorem. Bald. &
in. ad auth. sacramenta pub. And according to
 the Canon Law (which Craig says, we follow in
 that concerns our Consciences) *juramentum*
semper est servandum, quotiescunque potest servari
in dispendio salutis æternæ.
 It is likewise alledged for him, that *Minori-*
bus deceptis, non decipientibus est succurrendum; be-
 cause there the want of wit, which is the ground
 of restitution, ceases; and it were also unjust,
 that this remedy should be abused against the
 design of the Legislator; nor should the Minor
 have the protection of that Law, which he has
 offend-

offended: But so it is, that its offered to be proven here, that the Minor was a person trafficking upon his own account, and such cannot be restored, *Fortia de restit. min. part. quest. 23.* How dangerous were it, if such as were Merchants, and common Traders, should be repon'd? for then, who should Contract with them, or how could innocent people be secured? That same necessity and publick interest, which introduced the priviledges of Minority, has likewise introduced many other priviledges in favours of Commerce; and since it were disadvantageous to debar Minors from Trading, it were unreasonable to state them in a condition, in which their Trade would be ineffectual; for who would bargain with them, or bestow trust upon them, if their transactions could be rescinded upon the pretext of Minority? It is (say they) to be presumed, that experience and art (learned by them whilst they were practisers) doth supply the imbecillity of their greener years, and since by learning and art, such as are very young, outstrip very far such as are of riper years, and attain to very much exactness in the subtlest Sciences, why may not application refine them also to a sufficient consistency in merchandizing, in which there are no such mysterious points? Upon which account, even our Law has introduced, that Advocats, Notars, and others in publick Offices, cannot revoke what they do in their Minority, as was decided, *July 19. 1636.*

If, say they, the Minor was forced to sell

his Heretage, it was to redeem his person from prison, and freedom is preferable to Heretage, because liberty can please without Heretage, but Heretage signifies nothing to one who wants liberty ; and for this Heretage my Client gave out his Money, by which he had raised himself to a considerable Fortune, and being forced by want of this Money to quite his Trade, he did lose hope of gaining a greater Estate, than that which the other sold : but this he did to prefer his Friend to his hopes, and so this Friendship and Relation which the Pursuer would make the Foundation of a Cheat, was indeed the Foundation of this Favour, and the Law presumes, that his Cousen would not have cheated him :

Notwithstanding of all which plausible representations, I humbly conceive, that the Minor my Client ought not to be tyed by this Oath ; and that what I debate in his favours may be the better understood, your Lordships will be pleased to consider, that all civil polish'd Nations, have in effect resigned so far their libertie to their Legislators, that these in their Contracts, are to be ruled by those in their Statutes : and God Almighty is more concerned in the œconomy and government of the World, than in the observation of privat Oaths ; and therefore, we must consider more the force of a Law, than of an Oath ; and if privat Oaths amongst parties could derogat from publick Laws, then

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the publick Laws should be absolutely evacuated, and remain as the empty shadows of what they ought to have been. And from this I infer, that since the Law has thought fit to declare all deeds done without the consent of Tutors and Curators to be null, that no deed done by any Minor having Curators, can bind him, except he be authoriz'd by their consent.

And from the same principle, I likewise infer, that the former distinction made in Law, betwixt such deeds as are *ipso jure* null, and such as are not *ipso jure* null, but are only reduceable, is so far reasonable, in relation to this controversie, that though deeds that are *ipso jure* null be not reduceable, if they be not confirmed by an Oath, yet deeds that are *ipso jure* null, are reduceable though sworn; for in case the deed be *ipso jure* null, it is reprobated by Law, and so is no deed in the construction of Law; and if it be no deed, it cannot be confirmed by an Oath, for a Confirmation presupposes a pre-existing deed, *sed non entis nullæ sunt qualitates nec accidentia*; and so this Oath wants here a Basis upon which it can be fixt. 2. It were unfit, that what the Law has expressely condemned, it should allow others to evite, for it should thus cheat it self out of its own authority, by such indirect courses, *Et quod directè fieri non licet, nec per ambages fieri licet*. In vain were Laws to be made, if every privat man might enervat its force, and evite its sanction by such subterfuges; this were to invite men to break and scorn

Laws, to allow them to tear off their own yoke, and to place every privat man above the Legislator. For, as Oaths exacted by Magistrats oblige not, when they are contrair to the Laws of God; so the Oaths of privat persons oblige not, when they are expressely contrair to the Laws of our Rulers, who are gods upon Earth. And as vows are declared null by God himself, if given by a Maid without the consent of her Father, so should Oaths for the same reason not oblige such as have Curators, for these are the Parents in Law. 3. No Oath can be *vinculum iniquitatis*, the tye of injustice; but so it is, that where a deed is declared null by the Law, that deed is in so far unjust; and to allow a deed that is unjust because it is sworn, were to establish injustice by an Oath, and to put it in the power of every privat person, to alter the nature of things, and to make that just which is unjust. 4. This would disappoint the cares and pains of the civil Magistrat; for, his design being to secure our posterity, because of the imbecillity of their Judgement, that would be absolutely eluded, and poor Minors would by that same want of Judgement and Sagacity, for which their deeds are reducible, be induced to swear, and so the remedy will become effectual, *nam eadem facilitate jurant qua contrahunt*. And since Minors cannot be obliged in their Minority, because of their imbecillity, Oaths should not bind them, except it could supply

that; and since the Law has given them Curators, it is just the deeds done by these Minors should not be respected in Law, since the forms prescribed by Law are not observed, nor the reason satisfied whereon it is founded. 5. This would open a door to Perjury, for such as could not cheat Minors, because of their less age, would cheat them by their Oaths; and thus, Oaths which should not be given but upon solemn and extraordinary occasions, would become cheap, and would be taken in every Ale-house, administrat by every Nottar or his Servant, and the best of tyes would oftimes be used in the most sinful occasions: and how can such Oaths as these oblige, since they want all the three qualities of an Oath, and for which, Oaths are declared in Scripture to be obligator? and these are, that they should be in truth, in judgement, and in righteousness. I know, that every man may renounce what is his own interest, but this Maxime holds only where men understand their own interest, but not in Minors, who want that ripeness of judgement, by which their Renunciations are sustained. And that the Oath is obligatory, tho' not the Contract is but a meer quible, for there is no action arising in common Law from an Oath, *qua tale*, Bart. ad l. si quis C. de fidejusi. Imol a l c. cum contingat de jure-jur. Such an Oath obliges in Conscience, but not in Law, and though it be the substance in the one, it is but an accident in the other.

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I need not debate here, that the *authentick Sacramenta puberum*, ascribes only this cogency to Oaths which are given *tactis sacrosanctis evangelis*, which though it may seem but a solemnity, yet has great force with it, in my opinion; for Solemnities do raise up the attention, and oblige more the Swearer to advert to what he is promising: and if Witnesses and others come to age, need these advertisements, much more do Minors need them, since they are oft overtaken by inadvertence. And as this caution seems not to have been unnecessarily adjoined by that excellent Law; so *Scraphinus* and others have required necessarily, that Solemnity in such Oaths as these, *antiqui quo major esset iurisdictionis religio, plerasque adinvenerunt ceremonias, quae jurantibus terrorem ac formidinem incuterent. San. Robert. Pag. 183.* and swearing by touching somewhat that was sacred, was very old. *Arg.*

Tango aras mediosque ignes & numina testor.

Justin also, l. 22, relates, that *Agathocles* swore a confederacy with the *Carthaginians*, *oppositis tactisque ignibus cereis*: and by all our old Evidents it is clear, that sweating upon the Bible or Altar, was used in all extraordinary cases. And for the same reason, Oaths in Write have been oft-times little respected by Lawyers, because the Write is oft-times not read nor considered, and passeth by too transiently to have all the force which a solemn and judicial Oath deserves, *vid. Bart. and l. qui jurasse, ff. de jure-jur. & facin. c. n-*

Law. lib. 3. cap. 8. So that we should either not seek the benefit of these Laws, else we should make use of the forms and ceremonies which they prescribe.

As to the assertory Oath, by which the Minor swore that he was Major, it is answered, that such Oaths ought not to be respected further than as the above cited Laws declare, which is, that these Oaths ought to be believed, except the contrair can be proven by Writ, and that the truth and strength of this probation cannot be taken off, and enervat by Witnesses, for a Writ is a more binding, and concluding probation than Witnesses, who may be mistaken, or may be corrupted. *Si tamen in instrumento per sacramenti religionem majorem te esse adseverasti, non ignorare debes, exclusum tibi esse in integrum restrictionis beneficium, nisi palam, & evidenter ex instrumentorum probatione, per non testium depositiones te fuisse minorem ostenderis.* But here it is offered to be proven, by the Register of the Church session where my Client was baptized that he was Minor the time of the transaction, and by this your Lordships may see, how dangerous it were to make such Oaths as these binding, and how easily Minors may be induced, not only to bind, but to damn themselves, and how little this person deserves, who was the occasion and solicitour of the perjury: were not this to baffle that sacred tye, by which Princes bind their Subjects

Subjects to a secure obedience, by which Judges oblige men to reveal the truth, and by which every private man is secure, when he referreth to his adversaries Oath, the truth of what is controverted amongst them. Nor can the defender maintain this Contract, as entered into by my Client, who was a Merchant by his profession, since though that may defend such as Contract with him, in things relating naturally to his Commerce, yet that should not be extended to such Contracts as these, wherein my Client is bound to sell his Heretage at too low a rate, *Et quæ ex necessitate per modum privilegii introducuntur, ultra casus necessarios non extenduntur.* Lands are not the subject matter of that traffique which the Law doth privilege; but on the contrar, Lands is not allowed to be sold, without the consent and sentence of a Judge; nay, and even these *qui veniam ætatis à principe obtinuerunt*, will be restored against the prejudice sustained by them in selling their Heretage, *l. 3. c. de his qui veniam ætat.* albeit no man could *impetrare veniam ætatis*, till he was past eighteen, and was proven to be prudent and frugal, *l. 2. C. eod* which is all that can be alledged against this Minor. Nor should our Law respect much *confinium majoritatis*, since they have shortned too much the years of Minority, in making it end at twenty one; whereas, the Romans and others who were sooner ripe, and more sagacious than we, extended Minority to Twenty five.

and since our times are more cheating than theirs, it was fit that our Minority should have been longer than theirs. But however, both of us agree, that *minore unitas computanda est de momento in momentum.*

To conclude then (my Lords) sure that opinion in all contraversies should be followed, which may do good, and can do no harm; and that is to be reprobated, which can do harm, and is not necessary towards the doing what is just. But so it is, that not to restore a Minor in such cases as these, may, and will necessarily destroy all Minors, who may be over-reached, and cannot be reponed, because of such Oaths; Whereas, such as contract with them, can suffer nothing by such reductions; for, either the Minors with whom they contract, are lesed, and then they will not be restored, and therefore such as contract with them cannot be prejudged: but if they can make it appear that they are prejudged, it will necessarily follow, that the Minor is not lesed, and so the Contract will not be lyable to reduction; and thus these Oaths will infallible prove to be either unnecessary or unjust.

This Cause came not to a Debate.

Against

Against Forfeitures in absence.

XIV. PLEADING.

My Lord Chancellor,

WE have subjected to our consideration, an Overture, which ought to be seconded by very convincing Arguments, before we pass it into a Law, seeing it innovates a custom, which is as old as our Kingdom, and older than our positive Laws. And customs, like men, may be thought to have had excellent constitutions, when they last long; and this Act, if pass, seems to infer the greatest hazard upon the two highest of our concerns, for such are our Lives and Fortunes.

The old inviolable custom of Scotland was, that no Probation could be led against Absents, either in Treason, or any other Crime, in any Court, save the Parliament; but the only Certification in all criminal Letters, was the being denounced Fugitives (or outlaw'd as the *English* speak) which custom hath maintained it self for many hundreds of years, by its own reasonableness, without the necessity of being fenced with any other Authority: and albeit the Parliament did reserve to themselves, a Liberty to proceed against Traitors, in case of absence, yet they

never granted that to any other Court; whereby it clearly appears, that our Predecessors have thought that power incommunicable to all such as were not Legislators, that procedure being rather a priviledged transgression, than an execution of the Law. But it is now craved by this Act, that in case of perduellion, and rising in Arms against the Prince it shall be lawful to the Justices to lead probation against absents, and forfeit them accordingly ; which seems to me most inconvenient, for these reasons. 1. Because the Stiles in all Courts are equivalent to fundamentals, and by an express Act of parliament with us, Stiles are not to be altered, But so it is, there is no Stile in the Justice Court, bearing any other certification against absents, but the being denounced Fugitives 2. There was never any Instances of it since the foundation of the Justice Court, and a negative Practique being so old and uniform as this, is most binding, especially where all the conveniences, reasons and advantages which are now prest, were then obvious; our Predecessors were sure as Loyal as we, and let us not be more cruel than they were. 3. The old custom was founded upon most convincing reasons ; for when persons are proceeded against in absence, they want the benefit of *exculpation*, for proving those just defences which are of so great consequence to them, and their posterity

posterity ; such as are, That though they were present upon the place, yet they were taken prisoners, and carried there, and were only going loose upon parroll, or fell accidentally amongst those Rebels, who had gathered themselves together, or went there by a command from some of His Majesties Officers, for reclaiming those who were in Armes, with many other defences which (the party being absent) none can know, and though known none dare propone, it being a maxim in our Law that none dare propone any thing to defend one, who being pursued for Treason is absent. Another great disadvantage, under which these will fall who are pursued in absence, will be, that such witnesses may be received against them, as are lyable to just exceptions, and whom they would decline, if they were present ; which objections likeways. none know, nor dare propone ; and it is likeways very well known, that there are many witnesses, who will depone, upon suggestion, very many things which they durst not assert, if they were confronted with the party against whom they were to depone, being sometimes overawed, and sometimes through pity driven to speak only truth, when they look upon his countenance who is to live, or die by their depositions. Upon which account, confrontation of witnesses and parties hath, in the civil Law, been used as a successful remedy and in ours the witnesses are ordain'd to look upon the pannells face when they depone. And albeie
it

it may seem, that there is little hazard of a probation, where the case is so notour, as that of rising in Arms; yet, the mistake lyes in this, that tho' therising in Arms be notour, it may be is not notour who were present, & the persons may be doubtful, though not the thing it self. A third great inconvenience is, that whereas those who are present may by interrogators, restrict, or explain, what seemed disadvantageous in the deposition of such as depone against them, they will by this innovation, forfeit this advantage amongst other losses. 4. No other Nation receives concluding probation against absents; many instances whereof might be given, but I shall satisfy my self with that of *Freisland*, cited by *Sand. lib. 5. def. 2. Praxis nostra habet ut Criminosus si fuga se subtraxerit, ad instantiam procuratoris generalis citetur, & si præfixa die non comparer, fiducialiter bona in contumacia panam annotantur*: which is exactly our custom; and by the Civil Law, *Tantum annotabantur bona rei non comparentis, ita ut si post annum venerit, & satis dederit de stando juri, ea recuperat, si non, bona perdit non tamen de delicto habetur professio, l. 1. & gloss. l. pen. & fin. ff. de requiren. reis.* which Title begins thus, *Divi-fratres res scripserunt ne quis absens puniatur, & hoc jure utimur, re absentes damnantur.* And *Hottoman* tells us, that *Majestatis crimen in foro apud suum prætorem, perduellio vero à populo Romano comitiis centuriatis in campo martis judicabatur*; which was much more reasonable, than our present Overture, seing the greater the Crime is, it should

should be the more solemnly, and slowly judged; from which procedure of the Romans in perduellion, it seems our old practice of judging only absents in the matter of Treason by a Parliament hath taken its origine, for *Comitia centuriæ* was to them, what a Parliament is to us, I might here likewise, alledge the authority of *Mathæus*, the Learnedst Civilian who ever wrot upon that Subject, *tit. 2. num. 6.* whose Words are, *Denique cum leges vetant absentem damnari, crimen perduellionis non excipiunt; erit igitur & hic observandum, quod in aliis criminibus, ut absens requirendus adnotetur, & bona obsequantur, publicentur denique, si intra annum non responderit. L. absentem, 5. C. de poenis. L. absentem, 6. C. de accusat. l. ult. D. de requir. vel abs. damn. Nam quanquam perduellio gravissimum crimen est, videndum tamen ne in occasione sevitia atq; calumnie habeatur; & pag. 371. dicit Math. Falsum esse absentem in hoc crimine posse damnari, nec ullo juris loco excipi crimen Majestatis. Dicitque supradictam extravagantem Constitutionem, nullam auctoritatem obtinere apud interpretes juris civilis. 5. By the 90. Act. Parl. 11. Ja. 6. It is most justly statute, that all the probation should be led in presence of the Pannal, and the Assize, which shows clearly, that our Law hath been always jealous of probation led in absence, and that probation is only to be led in presence.*

This innovation is recommended to us upon these reasons. 1. That these who are
con-

contumacious, and flee from justice, should be in no better condition than those who appear, and they cannot complain of any of the forsaide disadvantages, seeing these are occasioned by their own absence and fault. To which it is answered, that a person who is pursued for Treason may be absent, not upon the account of any guilt, but because the citation never came to his knowledge ; as if he be at the time abroad in Forraign Countreyes, where citations at the Mercatcrosse of *Edinburgh*, and Peer and shore of *Leith* (which is all our Law allowes) seldom reach; and sometimes the persons summoned may be either sick, or in prison and not be able to appear, or being lyable to other accusations or fearing rather the present influence of some enemies, than their own guilt, dare not. For though Treason, as the most comprehensive of all other crimes to us, be of all others most abominated, when proven ; yet, of all other crimes, most Innocents are, by either malice or design ofttest ensnared, upon pretext rather, than by the guilt of Treason. For, as *Lipsius* observes of the times wherein *Tacitus* wrote, *Frequentate tunc temporis accusationes majestatis, unicum crimen eorum qui crimine vacabant*, *Tertullian* in his apol. says, *non licere indefensos omnino damnari, & a Carolo Magno institutum est*, lib. 7. cap. 145. *Ne quis absens in causa capitali damnetur*. *Plutarch* in *Alcibiades* life, makes *Alcibiades* to have given this prudent answer, to one who challenged

lenged him for not appearing to defend himself, *Cetera (inquit) omnia libenter, sed de capite meo, ne matri quidem, ne forte is, pro albo atrum calculum imprudenter injiciat.* Notat. & Liberius Pontifex Romanus Constantio Imperatori, Judicem non posse, absente reo, de crimine ejus judicare, nisi aut iniquus Judex sit, aut privato odio servit. Hist. tripart, l. 5. cap. 16. Seneca saith, lib. 6. de Beneficiis, cap. 38. *Quantum existimes tormentum, etiamsi servatus fuero trepidasse, etiamsi absolutus fuero, causam dixisse.* And as Cicero very well observes, these who are accused before any Judge for life, consider oftner what that Judge may do, than what in justice he ought to do, *Orations pro Quintio.* And thus we find, that *Athanasius* and *Chrysostom* would not appear at Councils, to which they were cited, albeit they feared their Judges more than their guilt, *Niceph. lib. 8. c. 49.* It were therefore very hard in any of these cases, to forfeit an absent of his Property, seing in these, innocence and absence are very compatible. Nor doth His Majesty suffer great losse by this, as is urged ; for if he who is pursued for Treason compear not, he is denounced Fugitive, and by that denunciation. His Majesty possesses his whole Estate, till he die, or compear ; and after death, he may be forfeit.

The second Argument is, by the 69. Act. Par. 6. Ja. 5. Traitors may be forfeit after their death

death, in which case they are absent, and want all the advantages above related. But to this the answer is, that the Law is so just, and merciful, that after a person is denounced Fugitive in the case of Treason, it allows him all the days of his life to purge his contumacy, by appearing to reclaim his innocence ; and it never despairs of the one, till the other be elapsed; and when it proceeds against any man to forfeiture after his death, it ordains the nearest of Kin to be called to exculpate him, by proponing defences, or objections against the witnesses and for doing every thing els which is usual in such cases or which might have been done by the Defunct himself, whereas he who is pursued in his own lifetime, cannot defend after that manner, as said is: After death likewise, death it self, which is the greatest half of the punishment, is over, and there is not so great hazard, as there is in his case, who is forfeit during life, who is by that Sentence (without any possibility of hearing) executed immediatly upon his being apprehended. After death also, malice, and design ordinarily ceases, so that the errors or prejudices of either pursuer or witnesses are not so much to be feared.

The third Argument is, that probation may perish in the mean time, if it cannot be received till after death. To which it is answered, 1. That this Argument, *aut nihil, aut nimium probat*; for, upon this account, Pursutes

Pursutes should be sustained for all other absents, this prejudice being common to all : But, 2. It is safer, that a just probation should perish, than that a suspected one should be received; and this one inconvenience should not weigh down the many, which are laid in the ballance of the other side. Parliaments are ordinary, and necessary after publick Rebellions, wherein that horrid Crime may receive its legal, as well as its just punishment ; or if they meet not, this may be otherways remedied ; for, probation may be led *ad futuram rei memoriam*, though the party be absent, reserving to him all his other defences, by which the Kings right may be preserved, and the Lieges rights not prejudged, and of all probations, that can least perish, which is to be led in the case of publick rising in Arms.

The fourth Argument is, that the civil Law admits forfeiture in absence, in the case of Perduellion (for so the common Law names that kind of Treason which is committed against the Prince, or State) and our Criminal Law being founded upon the Civil Law, ought in this, as in most other cases, to be squared by it. To which my answer is, that there is no warrant for that assertion from the Law of the Romans, for, by that Law, *bona tantum annotabantur*, as hath been said, in place whereof, *bona hodie locum obtinent* : which is equivalent to our Denunciations. But because citations of the Civil Law, would resemble pedantry too much, I shall recommend

mend to such as doubt this, the 16. *verse*, 25.
Chap. of the *Acts*, where *Festus*, a great Ro-
 man Lawyer, sure, (as all their Presidents of
 the Provinces were) tells us, *That it is not*
the manner of the Romans to deliver any man to die,
before he who is the accused. have the accuser face
to face, and be heard to defend himself concerning
the crime laid against him. I confesse, that for-
 feiture in absence is allowed *per extravag.*
Henrici septimi (and it is well called an extra-
 vagant Constitution) but that is accompted
 no part of the civil Law, and if we follow its
 model, we ought to allow forfeiture in absence
 in all points of Treason, as this doth; and
 even that Constitution acknowledges, that this
 was not allowed by the Romans, and if it
 had, this Constitution had been unnecessary, as
 it is now unreasonable. And I remember, that
App. Alex. in his third Book of the civil Wars
 relates an eloquent Harrangue made by *Lucius*
Piso, in favours of *Antonius*, maintaining, that
 no person who is absent could be condemned
 though upon probation, which was accord-
 ingly found by the Roman Senat. And though
 our Parliaments use to proceed against absents
 in case of Treason; yet, that is so seldom and
 solemnly done, that there is little hazard to
 the Pannals, and every man hath still some
 friends in so great a number, who may de-
 fend him; nor is it probable that the Parlia-
 ment, who are the great Curators of the Com-
 mon-wealth, and who are so much entrusted
 by us, as to have reposed upon them the Legi-
 slative

slative Power, will prejudice any privat party remembering it may be their case one day, which is now the Pannals, and that being a supream Court, is not stinted to follow a probation which is suspect, though privat Affizers might, for fear of an Affize of error; which makes a vast difference and disparity of reason.

Let us then (My Lord) consult, the interest of our Posterity, which is a generous kind of self-defence: for the Italian proverb observes well, that it is better to live in Countries which are barren, than in Countries where there are rigid Laws. Let us guard against what is cruel, as we wish what is just; and let us lawfully be careful now of these our Lives, and Fortunes, of which we have been too often unnecessarily anxious. God himself would not condemn *Adam*, till he heard him, and though he knew the sins of *Sodom*, and *Gomorrab*, he would not pronounce sentence against them, till he went down and saw their abominations. Let us not then make snares in place of Laws; and whilest we study only to punish such as are Traitors, let us not hazard the Innocence of such as are Loyal Subjects.

The learned reasons adduc'd for this Overture, and the opinion of the Session, prevail'd against this Discourse; and the Parliament did ordain, that absences might be proceeded against in the Justice-court, for publick rising in Arms.

For

*For the late Marquess of Argyl, immediately
before his Case was advised.*

XV. PLEADING

*Whether passive compliance in publick Rebellions
be punishable as Treason.*

My Lord Chancellor,

I wish it may be the last misfortune of my Noble Client, that he should be now abandoned to the patronage of so weak a Pleader as I am, whose unripeness both in years and experience, may, and will take from me that confidence, and from your Lordships that respect, which were requisite in an Affair of this import. In our former Debate, which is now closed, we contended from the principles of strict and municipal Law; but here I shall endeavour to persuade your Lordships, from the principles of equity, reason, conveniency and the custom of Nations; which is the more proper way of Debate before a Parliament, who make Laws, but are nottied by them, and who in making Laws, consider, what is fit and equitable, and then ordain what shall be Law and justice; and if your Lordships consider strict Law in this case, it were in vain for the loyalest Subjects, who lived in these three Kingdoms during

during those late confusions and rebellions, to defend his own actions by that rule: for, since intercommuning with Traitors, concealing of Treason and acknowledging their Authority are by strict Law, in regular times undeniable Acts of Treason, I am no more to debate abstractly my Clients Innocence as to these, for who amongst us did not share in that guilt? All did pay Sesse, all did raise Summonds in the Protectors name, we were all forced to be the idle witnesses of their Treasons; and therefore I shall only contend, that in such irregular times as these were; wherein Law it self was banished with our prince, meer compliance can amount to no Crime in him, and that as to this he lyes under no singular guilt; Especialy, seeing His Majesty has, by a Letter under His Royal Hand, declared, that he will not have His Advocate insist against him, for what was done by him, or any els, preceeding the year 1651. (in which time he was only an eminent Actor) having retired himself from all publick employments under Cromwells Usurpation, being known for nothing all that time, but a sufferer, and being forced by self preservation to do those things for which he is now accused, which being undenyably acknowledged by all the Nation, cannot but recommend these few particulars, which I am now to offer for him.

Compliance (as the verie word imports) is only a passive connivance, *Et præsupponit crimen*

crimen in suo esse hætenus constitutum ; and in Law, when a multitude offend (as in our case) the contrivers, and such as were most active, are, and should only be punish'd, *detrahendum est severitati ubi multorum hominum fraget jacet*: and therefore, this Noble Person being acknowledged to be none of the first plotters, nor having been singular amongst that vast multitude of compliers, cannot be brought in amongst such as ought to be punished. For, albeit where many may commit a crime, there the multitude of offenders should highten the punishment; yet, where the crime is already committed collectively by a multitude, there the number of offenders takes off the guilt, and in such cases, none should be punished (saith *Afflictus*) but in *flagranti & recenti crimine* (or with rid hand, as our Law termes it) *dum durat crimen, nec sine quorundam nece extingui potest seditio*, or where the renewing of the crime is justly to be feared; for punishments being of their own nature inflicted, not for what is past (seeing that cannot be remedded) but for example in the future, certainly where the rebellion is extinguished, and needs no more be feared, as in our case, (God be praised) it were cruelty to punish ordinar compliers. It is remarkable, that in the 13. 14. 15. Acts of the 5. Parliament of Queen Mary, such Scotsmen as did ride with English men, even where

where her Majesties Authority stood in its integrity. are ordain'd only to be lyable for what skaith they did to Scots-men who served the Country, and that they being charged, to leave assurance with English-men, and disobeying, should have no objection against true Scots-men for any wrong done to them.

If then such lenity was us'd and such commiseration extended to such as were involved in a publick Opposition to lawfull and standing Authority, and in a compliance with the English, who were at that time, born and sworn enemies both to this Crown, and Country; what may such expect as complied only when no visible Authority was able to protect such who were forc'd to comply, not out of any design to defend Usurpation, but rather out of a design to preserve themselves for doing His Majesty further service? And as in the Body natural, the ordinar rules of Physick take no place, when there is a violent and universal conflagration of Humors; so the ordinar rules of Law should have as little place in the Body-politick, when a whole Nation have run themselves head-long into a common distraction, To which purpose I cannot but represent to your Lordship, that excellent Law, made in the Reign of Henry the seventh of England, and with consent of that excellent Prince, wherein

wherein it was enacted, That no Subject should be guilty of Treason, for obeying one who was called King, though known to be an Usurper, because the people do there not rebell, but submit.

Necessity may likewise be adduced for extenuating this compliance, which is therefore said to have no Law, because it is punished by none; without complying at that time, no man could entertain his dear wife, or sweet Children, this only kept men from starving, by it only men could preserve their ancient Estates, and satisfie their Debts, which in honour and conscience they were bound to pay and without it, so eminent a person as the Marquess of Argyl. and so much eyed by these rebels, could not otherwise secure his life against the snares were dayly laid for it; and so this compliance did in effect resolve in a self defence, which *inculcata tutela*, seeing it can exempt a man from murder, and these other Crimes that are contrair to the Law of Nature, it should much more defend against the Crime of Treason which is only punished, because it is destructive to the government of our Superiours, and Statutes of our Country; and since Crimes are only punishable, because they destroy Society and Commerce, how can this compliance be punished, which was necessar for both these?

Mans will is naturally so frail, and man because of that frailty so miserable a creature, that

that to punish even where his will is straight were to add affliction to the afflicted, the want of this will defend mad men against paricide, and the degrees of this distinguisheth slaughter from murder ; and in the Acts of Parliament whereupon the Lybel as to compliance is founded, it is requisite, that the compliance be voluntar, thus in the 37 Act, 2 Parliament, 7a. 1. It is statute, that no man willfully receipt Rebels, and by the 205. Act, 14. Par. 7a. 6. these who apprehend not such as mis-represent the King, are as guilty as the Leasing-makers, *if it be in their power to apprehend them*, as the Act very well adds. Likewise, by the 144. Act, 12. Par. 7a. 6. The Lieges are only Prohibited to intercommune with such Traitors as they might crab ; for that Act, as it forbids all Commerce with Rebels, So it commands all the Subjects to advertise His Majesty of their Residence, and to apprehend them ; whereby it is clear, that this last Act is only to have Vigour, when the Authority of the Sovereign stands in force, & *per argumentum a contrario sensu*, seems to excuse such as submit to Traitors, when there is either nothing to be advertised, or when Advertisements of that nature, are either imprestable, or at least unprofitable, as in our late troubles, at which time, the residence of these Rebels was notour, and all correspondence betwixt the King and His People, was daily betrayed and intercepted Consonant to which, is that excellent Law,

l. 2. ff. de Receptatoribus, where it is said, that *Ideo puniuntur receptatores, quia cum apprehenders potuerunt dimiserunt*: and Bald. ad l. delictis. ff. de noxal. act. is most expresse, that *receptans rebelles, non voluntarie, sed coacte. quia sunt plures rebelles simul*: & eos expellere non potest sine suo periculo, non punitur aliqua pena. Thus likewise in the Statutes of King William, cap. 7. §. 2. it is said, *Pro posse suo malefactores ad justiciam adducant, & pro posse suo Justitarios terræ manu tenebunt*. And §. 5. it is ordained, *Quod magistratus pro posse suo auxiliantes erunt domino regi ad inquirendum malefactores, & ad vindictam, de illis capiendam*, By all which it is clear that not only should compliance be voluntar before it be criminal, but that likewise it must be a compliance against lawfull Authority, able to protect such as revolt from it. I remember in anno, 1635. James Gordoun being challenged for corresponding with Alexander Leith, and Nathaniel Gordoun, declared Traitors for burning the House of Frendraught they were assoylized, because the intercommuning challenged was not lybell'd to have been voluntar, and thereafter the Assize who assoylized them, having been pursued for wilfull error for absolving as said is, they were likewise absolved from that Process of error, in the which Process, that same argument was urg'd, but not so strong in point of fact as in our case; and because the design is that which differences the actions of men (*propositum crimina distinguit*) and seing design being

being the hid acts of the mind, are only guessed by the concomitant and exterior circumstances, I shall only intreat your Lordships to consider these few presumptions, which being joyned, may in my apprehension, vindicate this Noble Person from the design of voluntar compliance. 1. He is descended from a stock of Predecessors, whose blood hath prescribed by an immemorial possession, the title of eminent Loyalty, and that same law which presumes, that the blood and posterity of Traitors is infected with a desire to revenge the just death of their Predecessors, and an inclination to propagate their Crimes doth likewise presume Loyalty and a desire to be thankful, in the children of such as have received great favours, and performed great services, to such as have been the Benefactors. 2. These with whom he is said to comply, were known and avowed enemies to Nobility, had quite exterminated in *England*, and begun to exterminate in *Scotland*, all memory of Nobility, and badges of Honour; so that in his compliance, he must be thought to have voted against his own interest: nor can I see what advantage he could expect from a common-wealth, which valued, nor prefer'd none but Souldiers, a Trade, which suited neither his breeding, nor years. 3. They were enemies to Presbyterian Government, of which he has always shewed himself so tenacious, and of all Governments they did most hate that one, for which he had exposed himself to so many hazards, 4. That Usurper had

never obliged him neither by reward nor complement. 5. He was sworn their enemy both in Parliament and Councel, and charity as well as Law, presumes against perjury: 6. He was pursued by them most unjustly, both at Councel of War, and elsewhere, and was known to have been hated extreamly by their Commander in chief, for compliance with whom he is now challenged. By all which it is most improbable, that his Lordship would have linked himself with that abominable crew of miscreants, by whom he might lose much, but gain nothing.

His Majesty hath recommended this case to be judged by your Lordships, whom He knew the iniquity of these times did (though without any cordial assent) involve in the same guilt, and albeit it were a guilt, there will be hardly any found to cast the first Stone at him ; and His Majesty hath not delivered him up to be proceeded against, till by His Act of Indemnity) granted even to such, as were eminently engaged in the contrivance and execution of the most horrid plots that were perpetrated against him) He had first cast a copie to your Lordships of that meek procedure which he allowes, and not till he had (even notwithstanding of their compliance) preferred some to be Counsellours, some to Titles of Honour, and many to employments of great Trust. And were it not unjust, that he should suffer for acts of Frailty, when the Ring-leaders, and malicious plotters

plotters pass unpunished? And were it not
 unkindness to our Countrey, to have it thought
 that we had Subjects who deserved worse than
Lambert, Little, and others? I shall to all this
 add, that the guilt charg'd upon this Noble
 Person, is such as was thought prudence in
 those who were most Loyal, and this comply-
 ance was so customary, and so universal, that
 it was thought no more a Crime, than the
 living in Scotland was Criminal: whereas in
 Law, *qui sequitur communem errorem, non delinquit,*
& consuetudo facit actum de sua natura punibilem
impunibilem & excusat à pœna ordinaria, & extra-
ordinaria *Farr. Quest. 85. (de pen. temperandis*
 Custom is a second Nature, and example a
 second Law, and he who obeys them, obeys
quasi legem naturæ, & patriæ: and in all civil
 Wars and uproars, especially where such have
 lasted for a considerable time as in *Portugal,*
France, Germany, &c. none have been punished
 for mingling with the multitude, if they did
 not pervert them. And if we consult the
 Ancients, when justice and equity were not
 yet oppress'd by interest, and design, we will find,
 that *Julian* the Emperor having only punish-
 ed the chief rebels, *resistui omnes abierunt innoxii,*
quos in certaminum rabie in necessitas egerat, non
voluntas. And *Themistius* praises *Valens* the em-
 peror because *non pœna dignos existimavit qui*
vellam non suaserunt, sed qui abrepti sunt à morum
impetu, & qui succubuerunt ei qui jam rerum potiri
viabatur. And *Joseph. lib. 5.* tells us, that in such
 universal rebellions, *Titus* used only to punish

the ring-leaders, *unum criminis ducem puniebat reipsa, multitudinem vero, sola verborum increpatione seditionum concitatores, & duces factionum dicuntur*, l. 16. ff. *quando appell.*

It is likewise universally received by the Law of Nations, that such as submit after universal rebellions, either upon conditions, or who put themselves in the mercy of their Magistrats, (as *Grotius* doth most wisely observe, *lib. 3. cap. 11.*) are still secure, and therefore, since the Marquess did immediately upon His Majesties return, go to Court, to attend His Majesty amongst his other loyal Subjects judging from the dictates of his own conscience, that he was in the same case with your Lordships his present Judges, it were strange that he should fall, when others are in great multitudes pardoned, who fled out of a conscientiousness to their own guilt, especially since he offered to prove, that he testified to many hundreds during His Majesties absence, a deep sense of that misfortune, and an absolute aversion from that present Usurpation; and that he assisted His Majesties friends, both with money and advice; and who would think, that in equity he ought to die, by these whom he wish'd restored, and for which restoration he prayed daily in his Family; and die for complying with those, whose ruin he beg'd daily upon his knees? And though he did not joyn with some who were Commissionated by His Majesty, yet that proceeded not in him more then others from any unkindness to the

the Cause which he always allowed; as can be proved both by themselves and others, but from a perswasion he had, that such courses as they took, would ruine the design which was proposed; and any thing he did in opposition to them, was to defend himself and his poor Countrey, against injuries, which were designed against him upon privat quarrels, as he still offered to prove. If we consider that same interest of Nations, for which Treason is punishable, we will find it unfit to punish ordinar compliers after a tumult is quieted; for if every man that were involv'd in the guilt, did think that he were punishable, all would be forced pertinaciously to continue the rebellion they had begun, and to expect from successe only, that impunity which the Law denied: and thus your Lordships should make all future rebellions to be both cruel and perpetual.

I come now to the Probation adduced by his Majesties Advocat, for proving this compliance, and in order thereto, I shall lay before your Lordships these following considerations 1. That the weaker the Relevancy is, the Probation should be proportionablie the stronger. *gratius in uno, levandus in alio*. 2. That in Criminals, Probation should be very convincing. 3. The more Illustrious the Pannel is, the proof should be so much the more pungent, because the Law presumes Noble Persons less enclined to commit Crimes than others. 4. Where there is no penury of Witnesses, Probation

should be so much the clearer, because the Law presumes that all is known, which can be known: but so it is in this case, sixty Witnesses have been led (albeit our Law allows only 25. in Criminals) and a long time hath been taken, and many invitations given to all persons, in all corners, to come and depone, and it is believed by most of these silly persons, that it will be most acceptable to His Majesty, and may procure a reward to themselves, that they depone against his Lordship; which remembers me of these slaves in *Juvenal*, who at *Sejanus* fall invited one another to offer Indignities to his dead bodie, *Dum jacet in ripa calcemus Cæsaris hostem*.
 5. The Law requires in these atrocious Crimes, witnesses *omni exceptione majores*, and these are in Law expon'd to be such as the jealousy of the greatest enemy needs not suspect; whereas most of all the Witnesses adduced, are either the servants of such as have been debarred themselves from witnessing, for fear of partialitie, or the Usurpers Soldiers, who have so oft forsworn solemnlie their alledgeance to their Prince, that no Judge can rely upon their depositions; for it is presumable, that *semel perjurus*, will be *semper perjurus*. and albeit His Majestie, by His Indemnitie, hath vail'd their Crimes, yet He hath not taken them away, as is clear, *per l. ff. in, C. de generali abolitione*; the excellent words run thus, *Indulgentia (Patres concripti) quos liberat, not ac, nec infamiam criminis tollit, sed pœnæ gratiam*

gratiam facit; whence I argue, that infamous persons cannot be Witnesses, but so it is, that perjured persons (*non obstante amnestia & remissione*) are infamous by the foresaid Law; the Criminal Registers likewise tells us that one who had been condemned for forging of false Writes, was refused to be received as a Witness in *Frendraughts* Process, albeit he had obtained a Remission; and certainlie, Perjury in the crime of Treason (whereof these Soldiers are guilty) is a more odious Crime, than that of forging of false Writes. 6. I hope your Lordships will consider, that most of what these Witnesses have deponed, are Speeches, which the best of men may have forgot, after so long a time, and in a time when both men and manners have been much confounded, by the strangeness and number of interveening accidents: most of these Witnesses have deponed upon that which fell under sense, and so have acted rather the parts of Judges, than Witnesses. Thus some depones that the Marquess's Boats did bring the English up *Lochfine*, and that they could not have got up without his assistance, which last part as it is negative, so is an act of the judgment, and not the object of any exterior sense, and they presume they had an order from the Marquess, because else they durst not have gone, and is not this to imagine, and not to depone? 7. Most of them are persons, whom the Dittay acknowledged to have been wronged by the Marquess; most of these poor persons who have

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deponed,

deponed, were to my certain knowledge, confounded by appearing before a Parliament and by interrogators, that they scarce knew what to answer. 8. Not any two of these numerous Witnesses concur in their depositions, all vary, and most do clath, and are either *Vatcillantes*, or *Singulares*; neither can the deposition of one Witness, as to one particular circumstance of a Crime, and the deposition of another as to another, be joyn'd for making up a clear Probation, for there the Judge is certified of neither of these circumstances, seing on Witness is none, whereas proving witnesses should be *contestes*; and if a Pannel were accused of more Crimes in one Lybel, the deposition of one Witness to prove one, and of another to prove another of these Crimes would not prove the Lybel; so neither can the singular deposition of two witnesses upon different points, prove one crime. Such spelling is not lawfull in probation, and this is that which the Doctors call *singularitas* *et diversificativa*, which in Law hinders conjunction in probationi us, as well as *singularitas obstitativa*, *Alexand. consil. 13 Hippol. in sua praxi S. diligenter num. 149 Farin. tract. de oppos. constadict. testium. 9.* The Law makes a difference as to the probation betwixt Perduellion, or open Treason, in which they require most convincing probation, and in conspiracies or occult crimes. in which the rigour of probation is omitted, because the possibility of proving is much restricted in respect of the
Clandestinesse

clandestineſſe wherewith ſuch Conſpirations
 are managed; and therefore, ſeing in this caſe
 the acts to be proved were committed pub-
 lickly, ſuch as joyning in open hoſtility with
 the Uſurpers, aſſiſting at their Proclamations,
 levying Forces againſt His Majeſties Gene-
 rals; Certainly the probation ſhould be moſt
 illative of what is alledged, and the provers
 ſhould be *omni excepti-one majores*. I muſt tell
 you my Lords, that ſome have been ſo unjuſt
 to you, as to fear, that though the probation
 be not concludiſg, that yet ye will believe,
 to the great diſadvantage of my Noble Client,
 the unſure depoſition of that as foul, as wyde-
 mouthed witneſſe, *publick brute and common fame*,
 which as it is more unſtable than water, ſo
 like water it represents the ſtraighteſt objects
 as crooked to our ſenſe; and that others of
 you retain ſtill ſome of the old prejudices
 which our civil and inteſtine diſcords, did
 raiſe in you againſt him, during theſe late
 troubles: but I hope, generoſity and conſci-
 ence will eaſily reſtrain ſuch unwarrantable
 principles, in perſons who are by Birth, or
 Election, worthy to be ſupream Judges of the
 Kingdom of Scotland. It is unmanly to de-
 ſtroy your enemy unarmed, but unchriſtian
 when you repreſent GOD as Judges; for then
 you endeavour to make him a murderer; and
 in my judgment, he revenges himſelf but
 meanly, who to ruine his enemy, deſtroys
 his own Soul, and taſhes his Honour.

My Lords, as Law obliges you to abſolve
 this

this noble Person, so your interest should persuade you to it. What is now intended against him, may be intended against you, and your Sentence will make that a crime in all compliers which was before but an error and a frailty; your Royal Master may with our Saviour then say to you, *Thou cruel servant, I will condemn thee out of thine own mouth*: Or, if your Lordships be pardon'd, he may say to you as his master said to the other, *Sure I did pardon thee, why wast thou so cruel to thy fellow servant*? but, not onlie may this prove a snare to your Lordships, but to your Posterity. Who in this Kingdom can sleep securely this night, if this Noble Person be condemned for a compliance, since the Act of Indemnity is not yet past? And albeit His Majesties clemency be unparallel'd, yet it is hard to have our Lives hung at a *may be*, and whilst we have a Sentence-condemnator standing against us. *Phalaris* was burnt in his own Bulls: and it is remarkable, that he who first brought in the *Maiden*, did himself suffer by it.

I do therefore humbly beg, that since this Process was intended upon Informations given to His Majesty, of the Marquess's being very extraordinarie active for the Usurpers, that your Lordships would transmit the Process as it now stands to His Majesty, that thereby he may have a fair occasion to give a generous testimony of his clemency, that the people may be secured against all jealousies and fears, and that your Lordships may be rescued from so invidious a tryal. For

For *Mavia*, accused of Witchcraft.

XVI. PLEADING.

I Am not of their opinion, who deny that there are Witches, though I think them not numerous ; and though I believe that some are suffer'd by providence, to the end that the being of Spirits may not be deny'd ; Yet I cannot think, that our Saviour, who came to dispossess the devil, who wrought moe Miracles in his own time, upon possess'd persons, than upon any else, at whose first appearances the oracles grew dumb, and all the devils forsook their temples ; and who promised, *John 12.* that the Princes of this World was now to be cast out, would yet suffer him to reign like a Sovereign, as our fabulous representations would now persuade us.

This person for whom I appear, stands indicted as a Witch, upon several Articles, the first whereof is, that she did lay on a Disease upon A. B. by using a Charm. 2. That she took it off by another. 3 That it is deponed by two penitent Witches, that she and they did flee as Doves to the meeting place of Witches.

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As to the imposing or taking off diseases by Charms, I conceive it is undeniable, that there are many diseases whereof the Cures, as well as the Causes, are unknown to us ; Nature is very subtile in its operations, and we very ignorant in our inquiries; from the conjunction of which two, arises the many errors and mistakes we commit in our reflections upon the production of nature : to differ then from one another, because of these errors, is sufferable, though to be regrated ; but to kill one another, because we cannot comprehend the reason of what each other do, is the effect of a terrible distraction; and if this were allowed, the most Learned should still be in greatest danger, because they do oftentimes find mysteries which astonish the ignorant; and this should give occasion to the Learned to forbear deep searches into natural mysteries, lest they should lose their life in gaining knowledge, and to persecute one another: for every Physician or Mathematician who is emulous of another, but cannot comprehend what his rival doth, would immediately make him passe for a Wizard. It is natural for men to think that to be above the reach of Nature, which is above theirs. If this principle had taken place amongst our predecessors, who durst have us'd the Adamant? For certainly, nothing looks liker a Charm, or Spell, than to see a Stone draw Iron ; and men are become now
so.

so wise, as to laugh at these who burnt a Bishop, for alledging the World was round, so blind and cruel a thing is ignorance: And if this principle, of believing nothing whereof we do not see a cause, were admitted, we may come to doubt, whether the cureing of the *Kings Evil* by the touch of a Monarch, may not be likewise called charming. This then being generally premised, to curb the over-forwardnesse of mankind,

It is alledged, that the Lybel is not relevant, in so far as it is founded upon my Clients having threatned to do her neighbour an evil turn, that she went in to her house, and whispered something into her ear, whereupon she immediatly distracted: for, though threatning, when mischief follows, hath been too much laid weight upon by us, yet the Law hath required, that many particulars should concur, ere this be sustained, as that the person who threatned did ordinarily use to threaten, and that mischief constantly followed her threatnings, *minæ ejus quæ solita est minas exequi*, that these threatnings appeared rather to be the product of a settled revenge, than of a boiling and airie choller, which doth oftentimes, especially in women, occasion very inconsiderat extravagancies. 2 It is required, that the threatnings were specific, as if she had promised that she should cause her distract, and the distraction accordingly followed :

everie accident to a general threatning, as is clear by *Dallrio, lib. 5. sect. 3.* Lawyers likewise consider, if the occasion of the quarrel was so great, as might have provok'd to so cruel a revenge as that which was taken; whereas here the occasion was verie mean, not exceeding two pence. And though all those do concur, yet *Farin. Quest. 5. num. 37.* acknowledges, that these are not sufficient to infer the crime of Witchcraft, but onlie to load the person accused with a severe presumption, or to infer an arbitrarie punishment; and in the Process against *Katharine Oswald*, the 11. of November, 1629. those threatnings though the effect followed, were not found sufficient to infer Witchcraft, but onlie to be punishable *tanquam crimen in suo genere*, that is to say, as an unallowable and scandalous kind of railing.

The second defence against this Article is, that it is not relevant to Libel, that the malefice was occasioned by my Client, except it were condescended by what means it was occasioned; for in Law, when I am said to have produced any effect, there must be a necessary contingencie shewed betwixt what I did, and what followed, for else, the verie looking upon her might have been said to have been a cause, and when sicknesses are alledged to have been occasioned by Witches, the ordinar signs given, are that the disease be in it self such as cannot be occasioned by

by nature, as the vomiting up of nails, glasses, & other extraordinary things; that the persons maleficiar do go in an instant, from one extremity to another; as from being extreemly weak, to be immediatly extreemly strong; or use extraordinary motions which cannot be occasioned by Nature, as *D. Autum.* in his discourse of Witchcraft doth most learnedly observe. But so it is, that neither of those can be observed here; for distraction is a verie natural disease, and has oft-times fallen upon a man in an instant, especially upon an excess of fear; and who knows, but this Weman, who by her Sex and Humour, is known to be verie fearful, might have been so surpris'd at my Clients coming into her, after the threatning, that this excess of fear might have thrown her into that distraction, under which she now labours; and yet my Client might have had no influence upon her as the cause, but as the occasion only of this her distemper.

All conclusions in criminal cases should be verie clearlie inferred since the crime is so improbable, and the conclusion so severe. And therefore Lawyers are of opinion, that if the inferences be not demonstrative and undeniable, *conclusio semper debet sequi debiliorem partem*, that which may be, may not be, and Lawyers do constantlie conclude, that we must only conclude that in crimes to have been done, which could not but have been done. And who can say, that necessarily this was done by her here, which could not but occasion

his

this Distraction, and therefore, *Perkins cap. 6.* does assert, that no malefice can be a sufficient ground to condemn a Witch, except she either confess, or that it be proven by two famous Witneses, that she used means that might have produced that effect. And tho' where Charms and other means expressly discharged are used, these unlawful means are by the Judge reputed, as if these means might have been effectual, *in odium illiciti*, and that the users have only themselves to blame in that case, who would use these Charms, Spells, and Incantations, of which the Law is jealous: yet where none of these are used, but a simple whisper, the effect in that case cannot be said to have flow'd from it, nor does any severe presumption ly against a thing that is ordinary. And *Bodin. lib. 4.* concludes, that *in capitali judicio ex presumptionibus veneficas non esse condemnandas, ut si sage deprehendantur egredientes ex ovili cum offibus, busonibus, vel aliis instrumentis magicis instructæ licet oves statim moriantur.* All conclusions must be necessary or presumptive; but so it is, that this conclusion is not necessary. since all these remedies might have been used, and yet the user might have been innocent: for a necessary conclusion is *d qua veritas abesse non potest*, and if this inference be only presumptive, it is as undeniable, that Witchcraft cannot be inferred from such a presumptive conclusion, as is clear by *Fa in. quest. 36. num. 11. Perkins, Bodin, and others* above cited: and if it were otherwise, Judges might

might condemn upon guessing or malice, and so mee would be in danger to die by injustice, than by Witchcraft; and may you not as well punish such as stay bleeding by applying a stone, or who prevent Abortions by girding the Woman with a Belt, now much in fashion? And therefore it is very remarkable, that by the 73. Act, 9. Par. Queen Mary, Witchcraft, Sorcery, Nectromancy, and sick-like arts for abusing the People, are only forbidden; nor can it be subsumed that any Art, or exterior thing, whereby People use to be abused, were here used, and therefore this Article cannot be said to fall under the Prohibition of the Act of Parliament.

The second Article is, that my Client did cure the Person whom she had formerly distracted, by applying a *Plantane* Leaf to the left side of her head, and binding a Paper to her Wrist, upon which was write the name of *Jesus*. Which being done by her who was an ignorant person, being done to the person who formerly distracted upon her whisper and the Cure being perfected in lesse time, than Nature uses to take for composing such general and horrid distempers, might necessarily infer, that this Cure was performed by Witchcraft.

Against which Article, it is alledged, that the Conclusion here should demonstrat, that necessarily this Cure was performed by no natural Cause, whereas

whereas the mean here used, viz. the applying of a plantane leaf, is a natural thing, and may cure in a natural way, it being known that there is nothing so cold as a Plantane Leaf, and so it might have been very fit for curing a distraction, which is the most malignant and burning of all feverish distempers. Or who knows, but that this distraction having been occasioned by the excessive fear she had of my Clients revenge, but that how soon she was reconciled to her, and that she had by the same strength of fancy which made her sick, conceived that she would likewise restore her against that sickness, her distraction might have abated with her fear? 2. The Law-giver having punished crimes, because these crimes are destructive to their Subjects, and Commonwealth, have for the same reason only punished such indifferent enchantments, as did either kill men, or ensnare them to unlawful lusts, but not those Arts, where the health of man and the fruits of the ground were secured, against diseases and tempests, as is clear, *Per l. 4. Cod. de M. lef. & Mul. Eorum est scientia puniendi, & sev. ijs inis merito legitus vindicanda, qui magicis accincti artibus, aut contra hominum moliti salutem, aut pudicis ad libidinem delexisse animos deteguntur, nullis viro criminationibus implicanda sunt remedia, humanis quesita corporibus, aut agrestibus locis, ne Maturis vindemiis metuerentur imbres, aut ventis grantinisq; lapidatione quaterentur: innocenter adhibita suffragia, quibus unius cujusq; salus, aut existimatio led. retur, sed quorum*

conferent actus, ne divina munera & labores hominum sterneantur. Which Law being a Statute made by *Constantine*, who was a Christian Emperor, being conceived in so devout terms, and insert by *Justinian*, who was a most Christian Prince, amongst his own Laws, cannot but be a Law very fit to be observed in a Christian Commonwealth. And though it be alledged, that this Constitution was abrogated by *Leo*, Nov. 65 yet it is very remarkable, that this Constitution made by *Leo*, is not insert in the *Basilicks*, so that it seems it has been thereafter abrogated.

It is not probable, that the Devil, who is a constant enemy to mankind, would employ himself for their advantage; and the Name of *Jesus* being used, so much respect ought to be had to it, that the user should not be punished with Death, except it could be clearly proved otherwise, that she had received this Charm from the Devil; in which case, the Author, and not the thing, occasions the punishment, or else, if she had been discharged by the Church, or any Judicatory, to use that Cure, as that which was in it self dangerous; but to burn a poor ignorant woman, who knew not that to be evil which she used, were to make ignorance become Witch-craft, and our selves more criminal, than the person we would condemn. And all these Laws and Citations which can be brought to prove, that magical Incantations are punishable by Death, though employed for the well-fare
of

of mankind, must be interpret so, as to relate only to some of these unlawful cases above related. And I admire, that those who inveigh so much against this Constitution of *Constantine*, have never taken notice, that these Charms are only allowed, even for the wellfare of man and beast, *ubi innocenter adhibita suffragia*, where Devotion was used, though erroneously, as in this case. And we know, that a whole Family in *Spain* pretend to be able to cure Diseases by the touch, as being descended from *St. Katharine*, and are therefore called, *Saludadores*; and that another Family in *France*, who alledge they are descended from *St. Hubert*, do cure such as are bitten by mad Dogs, and yet neither of these are punished by any Law, since they ascribe their Cures to Devotion; And there are but few men who have travelled any where, but use some Charm or other, out of innocence or rallery; and to burn these, or the common People, who think they may follow their example, were an act of great cruelty. And since the Cross is allowed by the Canonists to be applyed to any part of the Body, *per c. non licet. 26. quest.* I see not why the Name of *Jesus* may not be applyed in the same way: Nor can I think that the Devil would allow the using of that sacred Name at which he is forced to tremble, and by the very naming whereof, all Ecclesiastick Histories tell us, that the Devil has been dispossessed, and therefore, *Ghirland. de sortil. num. 23.* gives it as a general

rule, that *ubi alia nomina ignota ultra
ei nomina inveniuntur, tunc superstitiosa dici
sunt & ita puniri.* Cassiodorus relates, that
this efficax remedium fuit. trina recitatio ver-
bi, Psal. 115. *dirupisti vincula mea, &c.* and Bar-
olinus in his Anatomy, defends, that these
verses repeated with a loud voice in the ear
of one affected with the Epilepsie, will cure
him,

*Gaspas fert mirham, thus Melchior, Balthasar
aurum,*

*Hec tria qui secum portabit nomina regum,
Solvitur à morbo, Christi pietate, caduco.*

And though some have disallowed even pi-
ous Sentences, or Names, when joined to su-
perstitious circumstances, as when they are
only to be writ upon Parchment, and cut too
in such a figure, or bound by so many threds
only, yet to condemn the users as Witches, when
they are used simply, as here, seems to be
the other extrem.

In things that are abstruse and dubi-
ous, the Law should still favour that
which tends to the good of the Common-
wealth: yea, and though it sometimes
may punish Charms, when used to the
disadvantage of men, though it know
them not certainly to be unlawful; yet it
should not follow, that it should punish
that which may tend to their Advan-
tage, except they know it to be certainly
unlaw.

unlawful. And though our Act of Parliament punishes such as seek help by unlawful means of Sorcerers, or Necromancers, yet they must first be proved to be Sorcerers, or Necromancers, who make a trade of abusing of people, as that Statute says, which cannot be drawn at all to a dubious Cure used in one case, and by the application of natural means ; and therefore though *Drummond* was burnt as a Witch, albeit he had never committed any malefice, but had only cured such as were diseased, yet having in a long habit and tract of time, abused the People, and used Spells and Incantations, which had no relation at all to Devotion ; and having continued that trade, albeit he was expressly discharged, his case was very far different from this, and deserved a far more severe punishment. The same may be likewise answered to the condemnatory Sentence pronounced against *John Burgh*, who was convicted of Witch-craft in *anno 1643.* for pretending to cure all diseases, by throwing into water an unequal number of pieces of Money, and sprinkling the Patients with the water ; so that it may be justly said, that these died rather for being publick Cheats & *falsarii*, than for being Witches, & *venefici*. Upon which account *ari Pauliana* also is punishable, by which some Cheats pretend to cure diseases, by Spells and poisonous Characters, revealed (as they pretend) to *S. Paul*, when he was carried up to the
third

third heavens ; for, here the foundation makes the cures known to be Cheats.

I might likewise alledge here, that it is against the confest principles of all Criminalists, that *una venefica non potest esse ligans & solvens in eodem morbo*, cannot both put on, and take off a Disease ; for, it seems that the Devil thinks, that it were too much to bestow such favours upon one of his favourites, so that he is juster than those, who affect plurality of Benefices ; or els he thinks it would lessen too much the esteem of those faculties, if one could exerce both ; or els it is not probable, that she who had the malice to lay on the Disease, would condescend to serve in the taking it off. But however, I find much weight hath been laid upon this Principle, by those who did debate *Margaret Hutchinsons* Process, and so let it have its weight.

The third Article of my Clients Endictment is, that it is deponed by two dying and penitent Witches, that she flew like a dove with them to their meeting places.

This Article seems to be very ridiculous ; for I might debate, that the Devil cannot carry Witches bodily, as *Luther, Melancthon, Alciat, Vairus* and others assert, because it is not probable, that God would allow him the permission constantly to work this miracle, in carrying persons to a publick Place, where they join in blaspheming his Name, and scorning his Church. Nor is it proper either, to the nature of heavy Bodies to

flee in the Air, nor to Devils who are spirits, and have no arms, nor other means of carrying their Bodies: But I may confidently assert, that he cannot transform a Woman into the shape of a Dove, that being impossible, for how can the soul of Woman inform & actuate the body of a Dove, these requiring Diverse Organs, and Administrations; and to believe such transmutations is expressly declared Heresie by the Canon Law, and to deserve Excommunication *cap. Episcopi. 26. quest. 5.* and is condemned by St. *Augustin, lib. 18. de civit. Dei, De lib. 2. quest. 18. Girland §. 7.* and though the Scripture tells us, that *Nebuchadnezzar* was transformed from a man to a beast by God, yet it follows not that the Devil hath that power; or as some Divines assert, he did but walk, feed, and cry like a Beast, and had brutish thoughts.

We must then conclude, that these confessions of Witches, who affirm, that they have been transformed into Beasts; is but an illusion of the fancy, wrought by the Devil upon their melancholy Brains, while they sleep; and this we may the rather believe, because it hath been oft seen that some of these confessors were seen to be lying still in the room when they awak'd, and told where, and in what shape they had travelled many miles: Nor is this illusion impossible to be effectuated by the Devil, who can imitate Nature

and corrupt the humours, since melancholy doth ordinarily perswade men, that they are Wolves (*Licantropi*) Dogs and other Beasts.

Since then these Confessions are but the effects of Melancoly, it follows necessarily, that the Depositions of these two Witches amounts to no more, but that they dreamed that my Client was there: and were it not a horrid thing, to condemn innocent persons upon meer dreams, as is concluded by *Frans. Pontzan. tract. de lamiis. cap. I. num. 52. Sunt illuse, ergo non est. stantum ipsorum confessionibus: confessio enim hæc deficit in suis principiis, & est contra naturam, & ita impossibilis.* I confess, that such Confessions may be a ground to condemn the Confessors, because though they were not actually where they dreamed, at these meetings, yet it infers that they had a desire to be there, and consented to the Worship, and believed that Transformation to have been in the Devil's power; but all these are but personal guilts in the Confessors, and cannot reach others. And besides this, it is very clear, that the depositions even of confessing and penitent Witches, are no concluding probation; for they are *sociæ criminis*, and such are not to be believed, they are infamous persons, and such ought not to be believed; and they can give no sufficient *causa scientiæ* and reason of their Knowledge,

Iedge, the want of which doth in Law enervat the deposition of a Witness : and with us, the depositions of dying **Witches** were repelled, in the case of *Alison Jolly*, pen. *Off.* 1596.

Divines, whose punishments reach no further than Ecclesiastick censure, may punish not only certain guilt, but scandal ; yet Lawyers, being to inflict so severe a punishment as Burning, and loss of all their movable Estate, should not punish but what they know infallibly to be a real guilt, nor should they punish that guilt, till it be convincingly prov'd. For, though this Woman were guilty, yet if she be so, she will suffer by the sting of her Conscience here, and will be reserved for a greater fire hereafter, than you can ordain for her ; whereas if she be innocent, your Sentence cannot be reformed. And why should you take pains to augment the number of the Devils Servants in the eyes of the World ?

Nor doth the Civil Law punish always what Divines condemn ; for thus, though it be murder by the Divine Law to kill a Wife taken in the act of Adultery, yet the Civil Law allows it : and though it be unlawful by that Law to cheat our Neighbour in buying or selling, yet the Civil Law allows all such bargains, except the cheat amount to the value of the half. Thus, the one of the Laws respecting mainly the good of Souls, and the other the good of Commerce, as they have different ends, so they take different means.

Sures

sites; and therefore it is, that politick
Laws, have allowed Cures even by suspect-
ed means; which principle is also allowed
by *Bartol. Salicet. Azo.* and others, *ad dist. l.*
4. and even according to the principles laid
down by Divines, except there were a pae-
tion proved, or confest, all remedies should
rather be ascribed to nature than to Witch-
craft.

Consider how much fancy does influence
ordinary Judges in the trial of this crime,
for none now labour under any extraordina-
ry Disease, but it is instantly said to come
by Witchcraft, and then the next old de-
formed or envyed woman is presently charged
with it; from this ariseth a confused noise
of her guilt, called *diffamatio* by Lawyers,
who make it a ground for seizure, upon
which she being apprehended, is imprisoned,
starved, kept from sleep, and oft times tor-
tured: To free themselves from which, they
must confess; and having confest, imagine
they dare not thereafter retreat. And then
Judges allow themselves too much Liberty,
in condemning such as are accused of this
Crime, because they conclude they cannot
be severe enough to the enemies of God; and
Assizers are afraid to suffer such to escape as
are remitted to them, lest they let loose an
enraged Wizard in their Neighbour-hood.
And thus poor Innocents die in multitudes
by an unworthie Martyrdom, and Burning
comes in fashion; upon which account I

cannot but recommend to your Lordship
 serious consideration, that excellent passage
 of a Learned Lawyer, Baldwinus, ad §. Item
 lex Cornelia institit : de publ. jud. Sed quo gravius,
 & ab hominis ingenio magis alienum est hoc ma-
 lum, eo major adhibenda est cautio, ne quis ejus
 prætextu ab adversariis temere obruatur, facile
 enim hic quidvis confingere potest ingeniosa simula-
 tas, ut & multitudinem credulam statim emoruiat,
 & judices irritet adversus eum quem cum demoni-
 bus rem habere mentitur. Ante annos sexaginta,
 sensit infelix nostra patria magno suo malo, hu-
 jusce generis calumniis, magna erat Waldensium
 mentio, quos adversarii jactabant nescio quid em-
 meritis habere cum innumeris spiritibus, hujus cri-
 minis prætextu optimi quique statim opprimeban-
 tur, sed tandem senatus Parisiensis, causa cognita,
 vidit veras esse sycophantias & infelices reos li-
 beravit.

For

For *Titius*, accused before the Secret Council for beating his Wife.

XVII. PLEADING.

AS nothing but the last degree of passion could have provok'd my Client to correct this unfortunat Woman, so no Creature which doth not feel his grief, can express the reason, which forced him to it. Nor could the fear of punishment, if it were not joined with the sense of honour, move him to lay open before your Lordships, the sad story of these persecutions he has for seven years suffered, and the dishonourable secrets of his own family, which during all that time, he has laboured to conceal.

Not can I (my Lords) but regrave, that I should be forced to lead your reflections into my Clients house, & to shew you there a Woman burning, not with flames of love, but revenge ; embracing her Husband, not out of kindness, but to throw him into the fire ; watching him in his sleep, but that she might even disturb him in his rest ; inviting his friends to her house, but that she might lighten his infamy, in letting them hear her rail against him : & all this done, not for a day,

or under the excuses of passion, but for seven whole years ; nor done so passingly, as that he could entertain any hopes of her reconciliation to allay his grief ; but she begun to torment him the next day after the Marriage, beating him with her Slipper, so that only his Marriage wanted its honey-mooneth, and so malicious was her humour, that she could not bridle it for one day. And these Affronts were daily continued, most deliberately, and owned after all the remonstrances her Friends could make for reclaiming her, at which occasions she used to speak kindly of nothing to him or them, but her passions, justifying her lying of him as Wit, her railing against him as Eloquence, her revenge as Justice, and her obduredness as constancy.

This being the Person against whom I am to plead, I am obliged to give your Lordships some Character of him for whom I appear, who was not only born a Gentleman, but by being a Souldier has made himself so, and by both these qualities, has so strong an aversion against beating any Woman, that the great respect he had for that lovely Sex, made this Pursuer, after ten years intimate acquaintance, choose him for her Husband ; and for seven years, he hath not only suffered, but concealed his wrongs, to that depth, that his hair has by grief changed its colour twice, the strength of nature, and grief, overcoming each other by their several turns.

turns. Nor doth he think himself concerned to answer his Wifes calumnious reproaching him, as having been her Husbands servant; for it is most true, that after he lost his Estate in his Majesties service, her first Husband choos'd him for his Friend, and after his death, she choosed him for a Husband; which shews, that he had some worthy qualicies about him, which were able to supply that great want, the want of Riches; and is it not clear, that when Women begin to complain of so sacred a relation, they will make faults where they cannot find them? and these Wives who would divulge what is true, would invent what is false.

I confess (my Lords) that there is very much due to that excellent Sex, when they are what they ought to be; but our love to Wine. must not hinder us to call it Vinegar when it corrupts; nor should we flatter Tyrants, because we love Monarchies. But Judges must look more to Justice, than complement; and therefore, I must beg pardon to alledge for my Client that he cannot be punished for beating his Wife, because, the Wife is by Law under the power and authority of her Husband, which subjection is not only the punishment of her sin, nor will all this power repair to man, the loss he had by the injury done him when he got this power; but this power is put in the Husbands hands, for the good,

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not only of the Common-wealth, but of the Women themselves : as to the Common-wealth, it was fit, that in every Family the Husband should be empowered to correct the extravagancies of his Wife, and not to bring them before the Judge, and in publick, this would have divided Families, raised publick scandals, and many will be content to receive Correction in privat, who would never be reconciled after a publick Correction. And as to the Women themselves, it was fit, that she being the weaker Vessel, a creature naturally passionat, and wanting experience, should therefore be governed by, and subject to her Husband ; and as the Head may resolve to chastise or mortifie any part of the Body, when it thinks that Discipline will tend to the general advantage of the body ; So may the Husband, whom the Scripture calls *the head of the Wife*, correct the wife when that correction may tend to the advantage of the Family.

Let us but look back upon the first ages of the World, and we will find that the Husband had generally power of life and death over their Wives, even amongst the best of men, the Romans, and thus *Plin. lib. 14. cap. 12* reports, that *Egnatius Mecennius* kill'd his Wife, for having drunk too much Wine, and that her death was not enquired into, as that which the Law

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then allowed. And *Cæsar* tells us, *lib. 6.* that the Germans in *Uxores, sicut in liberos, vitæ necisque potestatem habebant.* And till this day, the southern Nations (whose wits ripen more than ours, as nearer the Sun) have still the same power continued to them, by which the Women lose little, for it keeps them from adventuring upon these extravagancies, for which our complementing Nations hate their Wives, which to a kind Wife should be worse than death. But if these Laws think this power of life and death fit for the Husband, it should at least teach us to bestow upon him the power of correction, for which I only plead; which power of correction, is by *Bonaventur* said to be allowed them by the Law of Nations 4. *sentent. distinct. 37. Masuer. tit. de possess. S. item maritus.* By the Canon Law, the Wife is declared to be more in the power of the Husband, than of her Father, *can. sicut alterius 7. quest. 1.* and that the Husband may imprison her, or keeper in the stocks, *can. placuit. 37. quest. 2.* And if we consider our Law we will find, that Husbands have the same power over their Wives, that a Father hath over his Child, *c. 121. leg. burg.* which Law saith, *That he should correct her, as not knowing what she should do, and as a Bairn within age, seeing she is not at her own liberty.* And as the Council would not hear a Child complaining that his Father had beat him.

him, So neither should they hear a Wife. We have also an expresse statute, 2. Dav. chap. 16. wherein it is appointed, that no accusation shall be received against a man for having occasioned the death of his Wife, except it be notoriously known, that he gave her wounds whereof she died; by which it is necessarily implied, that he is not punishable, nor cannot be accused for any wounds given which were not mortal; where likewise there is a decision of the said King David, related in these terms.

In the time of King David, a case happened in this manner; An man of good fame gave to his Wife, descended of great blood, an blow with his hand, of good zeal and intension to correct her, and she being angry with her Husband after that day, would not for no mans request, eat nor drink till she deceased, and entered in the way of all flesh. The friends of the Woman accused the Husband for the slaughter of his Wife: And because it was notour and manifest that he did not slae her, nor gave her no wound of the whilk she died, but gave her an blow with his hand, to teach and correct her, and also until the time of her death loved her, and entreated her as a Husband well affectionat to his Wife; the King pronounced him clean and quit, and thereanent made this Law.

But, I find it is answered by the Wifes Advocats (who can better maintain, than they could suffer what she has done) that though the Laws of other Ages and Nations, did, and do allow this power to the Husband

band ; yet, our present Customs, as well as our inclinations, hate that stretched and ungentle power : And though our Law did allow some power to the Husband for correcting his Wife ; yet, that power could not be extended to defend such violent courses as were here used, where the Husband did hold her head to the fire till her face was burnt, and did thereafter beat her with a slipper. Nor do any Law or Lawyers allow more than *modica coercitio* for her correction ; but such an excess as this would be punishable in a Father towards his Child, or a Master towards his Servant.

To which answer the poor Husband acquiesces as much as they, and by his patience and continued kindness, in spite of all these disgraces and affronts, he has testified more respect than the Law could have commanded. But since it is acknowledged upon all hands, that the Husband might have corrected his Wife, and that he is only punishable for having exceeded the just measures which the Law allows, I shall first relate the matter of fact, and shall then examine, if he did not proportion the punishment to the injury.

After my Clients Wife had sworn she would starve her self, if he would not renounce all her estate, he (good man) condescended to her extravagant desire ; but not satisfied with this, she swore she would kill him, if he did not leave the Countrey :
and

and finding that he came in at night, she beat him with her Slipper, but finding he only smiled at this, she came running up to him with a knife in her hand, whereupon he threatened to hold her head to the fire, if she would not calm, and so took the knife from her. Notwithstanding of all which, both kindnesse, and threats, she did a third time flee in his face, but at last, fearing his patience might not only prejudge himself but her, he did take her and hold her face a little to the fire, but without any design, save of terrifying her; but she being strong, and malice supplying what strength her Sex denyed her, wrestled out of his hands, and in wrestling, threw her self up on the fire, and burnt a little her own face. All which shall be proved by witnesses, who saw the whole tract of that unhappy busle, for it was an aggravation of her guilt, that she used him thus publickly.

This being the state of the case, I hear such as stand behind me swear, had she been mine I had drowned her, or starved her, and I conjure your Lordships to reflect what any man would have done in that case; but I shall only debate, that this guilt deserved a more severe punishment, than what he inflicted. For. 1. in proportioning the punishment to the guilt, your Lordships will be pleased to consider, that the Husband never having punished her former extravagancies, was here to punish

punish at once, all that she had formerly done,
 and if every offence deserved correction, ten
 thousand offences deserved one that was very
 great; and if the Law after it hath punished
 the first two small thefts, punishes the third
 with death, and after it hath punish'd break-
 ing yards with small pecunial mulcts, mak-
 eth the third capital; may not the hundredth
 offence in beating a Husband, and laying
 snares for his life, deserve all was done,
 where the former faults were also to be puni-
 shed? And since no judge could have refused
 to have burnt her in the Cheek for three
 such riots, sure the Husband cannot be puni-
 shed for punishing a hundredth at the same
 rate; and I hope your Lordships will imagine
 that a Husband who suffered so many aff-
 fronts, would not have been too violent in
 punishing the last, and that she hath her-
 self to blame, having contemned the warn-
 ing given her by her Husband, and in giv-
 ing of which warning, it clearly appears,
 that he was master of his passion, and pro-
 ceeded both kindly and judiciously; or
 though he did deserve a punishment, yet by
 past sufferings, torments and affronts, may
 do more than satisfy her, for that one injury
 of which she can only complain: & as in bal-
 lancing accounts, so in ballancing mutual
 crimes, we must not look to the debt and
 credit of one day, but considering all that
 either party can lay to one anothers
 charge, we must at the ballance only
 determine

determine who owes most, and if that method be followed, then sure your Lordships will find, that as injuries may be compensated amongst the parties themselves, in so far as concerns their privat interest, so here, my Clients Wife having been more guilty towards him a thousand times, than he can be said to have been towards her, though this riot were acknowledged, her interest ceases and her complaint doth become thereby most unjust.

Though the Law designs to restrain our vices, yet because it cannot root out our passions, it pities them; it employes its justice against our crimes, but its clemency against our passions: and so high did this clemency run in the Roman Law, that he who in passion killed his Wife, being taken with her as adulterer, was not punished as a murderer, *qui impetu traaetus dol ri interfecerit*: and the reason the Law gives for remitting the crime is, *cum difficillimum sit justum dolorem temperare*, l. 38. ff. ad. l. jul. de. a. ult. And if any passion deserves pardon, it must in him who has bestowed pardons for seven years; or if it may plead against any, it must be against her who raised unjustly, the passion of which she complains. Injuries from a Wife are crimes; and if injuries can justifie passion amongst strangers, much more can they do it in a Husband.

I hope your Lordships will likewise consider, that self defence is not only a privilege introduced by Law, but a duty imposed upon

upon us by nature; and without this, this world were nothing but a Scaffold, and every man with whom we converse, might prove an executioner. Nor doth this self-defence only secure us when we kill such as would attacque our life, but it secures us likewise when we chastise such as would stain our honour; for life without honour, is but as a dead carcass, when the Soul is fled, or a King when he is dethroned. And since the Law has paralleled life and honour in every thing, it is most just, that seing we may kill such as invade the one, we may at least chastise such as invade the other; especially seing these who are here punished, have only themselves to blame, as the authors & occasions of all those accidents of which they complain: and therefore, my Lords, I shall intreat you to figure to your selves, what a man could do, if his Wife should constantly resolve to spit in his face when he were amongst strangers, or constantly awake him when he resolved to rest: were it not ridiculous to put the Husband always to complain to a Judge in those cases? and yet to suffer such injuries to be unpunished, were not only to make a man miserable, but to force him to an impertinent clemency, which might breed up his Wife to an insufferable insolence. And if mean people, (who wanting generosity and vertue, are curbed by nothing but awe and fear) should come to know that the Council allowed such an indulgence

gence to Women, and that there were no place for the justest complaints of injur'd Husbands, what ruptures would this occasion in privat Families: what numerable suits before your Lordships, and how many separations betwixt Husband and Wife?

Do then, my Lords, by this decision, let the people see, that as vertuous and deserving Women may expect the highest and purest respects imaginable, so such as shew themselves unworthy of these favours, may expect punishment answerable to their crimes. Nor is it a small aggravation of their guilt that they endeavour as far as in them lyes, to draw contempt and disgrace upon that amiable, and deserving Sex. Thus good Women will be complemented, when they find they owe not the respect they get to the Law only, but to their own merit, and unworthy Women will find, they may expect a happier life by taming their own insolencies, and by living in concord with their Husbands, than they can from their insolent, and outrageous abusing of them.

*The Counsel imprisoned the Husband
for one night.*

For

For Charles Robertson and his two Sons.

XVIII. PLEADING.

How far Minors may be punished for crimes, 2. Whether Complices may be pursued before the principal Party be found guilty. 3. Whether Socius criminis may be received in Riots and lesser Crimes.

THe crime for which my Clients are accused, is, that in *January 1660*, the said Charles Robertsons Brother and two Sons did convocat the Lieges, and throw down a house belonging to Elizabeth Rutherford, which they did at their Fathers desire, or at least, that their Father did ratihabit the same.

Against this Indictment, it is alledged, that the two Sons, the one being of the age of fourteen and the other of fifteen cannot go to the knowledge of an Inquest, for throwing down this house, since they offer to prove, that they were informed by their Uncle, that this house belonged to their Father, and that it was their Fathers desire they should go along with him to throw it down; for though Minors may be punished for atrocious crimes committed against the Law of Nature, such
as

as murther, Incest, &c. and to abstain from, which, the youngest conscience doth advise yet, such acts as cannot be known to be criminal, but by such as understand positive Law, are not punished as criminals, but in such as are obliged to understand that Law. None will contravert, that the throwing down such a little house, not exceeding six pounds Scots of value, and to which, they and all the Countrey had heard their Father pretend right, cannot be called a crime against the Law of Nature; and it is only a crime in positive or municipal Law, when it is done by such, as are obliged at the time to understand they are doing an injury, and that the house belongs not to him, at whose command they are throwing it down, and these Children were not obliged to know this; for since they are not in Law obliged to understand their own rights, till they be Majors; much lesse are they obliged to understand the rights of other men; and in this case the understanding the matter of rights, is that only which infers the crime, for if the Father had right, this had been no crime in him, nor them.

I am sure, there is a great distinction betwixt acts, which are of their own nature indifferent, such as throwing down of houses, taking men prisoners, &c. and these which are of their own nature vitious and criminal, and need no extrinsick thing

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to clear that they are so, such as murder, and robbery; the first doth require the knowledge of something that is extrinsick to the act which is done; nor is the guilt inferred but by reasoning, and judgement, and therefore that guilt should not fall upon Minors, except they are *dolosi*, and are presumed to have done it intentionally and upon design, and how can design be presumed in these Minors, since the committing this act did not take its rise from them, but from their Uncle, and Father, and they were to gain nothing to themselves, immediatly by it? nor can it be imagined, why the Law will for want of understanding, lessen the punishment in the most atrocious crimes, such as Witchcraft, murder, &c. in such as are thirteen years of age, if it will not remit absolutely the guilt, in such cases as these, where the guilt was neither palpable; nor the prejudice great. And if Minors be to be restored *adversus delictum* in any case, as is clear they are, they ought to be restored against this, where the guilt doth consist in a *punctilio* or nicety of Law, such as, that though the Father had right to the house, yet he could not have thrown it down by his own authority; a principle which few countrey men understand, when they have reached twenty one years, *si delictum fuerit commissum sine dolo potest minor jvari ope restitutionis in integrum, etiam ad hoc ut a tota pena excusetur*, Clar, *quæst. 60. & Anan: in cap. 1. num. 8. de delict. puer.* Nor can

I see a reason why crimes by the unanimous opinion of Lawyers are said not to be punishable in Minors when they are perpetrated *non committendo, sed omittendo* if it be not because omissions are *juris*, and fall not under sense, and proceed from a weakness of the judgment; but yet I think the former distinction more just, since omissions of what nature requires, should bind them, but nothing should bind them which proceeds from a weakness in judgment, since Law allows Minors to have no judgement.

But whatever be alledged against other Minors, yet these having obey'd their Father, in an act which was of its own nature indifferent, they cannot be punished for the guilt though he may, for that were to make poor Children unhappy, in subjecting them to double punishments, for if they obeyed not their Father, they could not escape their Fathers anger, or if they did obey, they fall under the Laws revenge. And it were very unjust, that the Law which has subjected them to the power of their Father, should not secure them when they obey that power to which it has subjected them. And upon the other hand, it would lessen much that power which the Law hath taken so much pains to establish in the persons of Fathers, and Masters, over their Children, and Servants, if it gave them occasion to debate their commands;

commands; and though a Son, or a Servant, are not obliged to obey their Father or Master, in things palpably atrocious, and wicked ; yet, where the thing commanded is not necessarily, and intrinsically unjust, they should either obey there, or no where; and what a great prejudice were it to the Common-wealth, if a Son or Servant should refuse to assist, in bringing back Cattle, which others were driving away, to labour land, or assist Poindings, or even throw down houses at their Father, or Masters desire, because they might pretend his right were not sufficient? and so the Father and Master should be still obliged to give an account to his Son or Servant, of his right and title upon all occasions, and his commands, which require oftentimes a speedy execution, should be delayed in the *interim*. To prevent all which, the Law hath for the good of the Common-wealth, allowed Sons, nor Servants, no will of their own, making them in effect but the tools and instruments for their Fathers and Masters will, *Nunc creditur velle qui obsequitur imperio Patris, vel Domini*, l. 4. ff. de. reg. jur. And if the Law allows them to have no will of their own, it cannot punish them when they obey their Master, for all guilt is only punished, because it is an effect of the will; and therefore, John Rae was not put to the knowledge of an Inquest, as art, and part of theft, because he went only along with

with his Father, when he was about twelve years of age, 1. of *Januar.* 1662. And by the 19. cap, num. 9. stat. Will. the servant is only declared punishable, if he do not detect his Master, or desert his service: and per. l. lib. homo. ff. ad. l. aquil. it is expressly decided that *si jussu alterius manu injuriam dedit, actio legis Aquilæ cum eo est qui jussit. si modo jus imperandi habuit, quod si non habuit, cum eo agendum est qui fecit.*

Though Minors may be punished for a guilt, yet they ought not to be indicted till they attain to the years of Majority, because if they were to be tryed in their lesse age, they might by want of wit and experience omit their own just defences, and mismanage the debate in which they were ingaged, as to which, our old Law appears to be very clear, R. M. lib. 3. c. 32. lib. 2. cap. 41. *quis dicere vel tacere potest calore juvenili, quod ei nocere potest;* Suitable to which Skeepe doth in his Annotations observe a decision, betwixt His Majesty, and the Abbot of Parbroth, anno. 1312. & l. pen, cod. de autor. tut. & l. 1. §. occisorum ad S. C. Sillan? & cap. 2. de delictis puerorum. extrav. Since a Minor may be restored against such omissions, or against a confession omitted by him, *quando non potest aliter contra eum probari crimen,* or may omit to object against Witnesses, it is more just and convenient, that he should not be tryed till he be Major. For, if he be tryed, he must be once punished, and then his being restored

ed is both impossible and unprofitable: and it were very inconsequential for our Law to have so far priviledged Minors, as that they are not obliged to debate *super hereditate paterna*, and that too upon these same reasons I here alledge, and that it should not much more secure them against criminal tryals in the same minority, where the hazard is greater, especially where the Common-wealth is not concerned (as here) to have the guilt immediatly brought to open punishment, and where the crime is not atrocious, reaching no further than privat revenge, and a pecuniary punishment. Nor is the publick in this case disappointed of a just revenge: for it can reach the Father or Uncle, who are alledged to be the principal actors.

For the Father, I alledge, that he cannot be pursued, as he who was accessory to the committing of the crime, in commanding or rathabiting it, except it were condescended from what particular acts his rathabition can be inferr'd whether by words, deeds, concealing, or otherwise; and it is not sufficient to Lybel in the general, that he did rathabit, no more than a Lybel would be relevant, bearing, that my Client were guiltie of treason, without condescending how, as is clear by the opinion of all Lawyers, who require, that Lybels should be special, which is required by them, to the end that the relevancy of the Lybel may be debated and determined by the Judges,

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before it go to a Tryal, which should be rather done amongst us, than any other Nation, because the probation is in this Kingdom tried only by an Assize, and these are ordinarily men who understand not the intricacies of Law; whereas if the particular way and manner of ratihabition be not condescended on, and discusst by the Judges, it must come to be debated after the probation before the Inquest; and thus not only relevancy and probation matter of Law, and matter of Fact, but even the distinct offices of Justices, and Assizers, will be here confounded. As for instance, if the Pursuer should prove, that the Father said that all was well done, we would be forced to debate before the Assize, that such passing words as these cannot infer a Crime, for else many thousands in a Nation might be found guilty of Crimes to which they had no accession: Or, if it were only alledged, that he received his Sons into his House, it would be likewise debated, that the receiving of a mans own Sons into his house, cannot infer a Crime *in delictis levi ribus*, though it may be debated to be criminal in Trason, and more atrocious Crimes: Upon which, and many other points, the Doctors have writte very learnedly, and to debate such points before ignorant Assizers were very dangerous.

It is likewise alledged for the Father, that he being only pursued as accessory to this Crime

Crime committed by his Brother, in so far as he did either command or rathabit, it is therefore necessarie, that the Brother be first pursued and discusst, it being a rule in all Law, that the Principal should be pleaded and discusst, before him who commanded the same to be done, or before the Receiver, as is clear by *R. M. lib. 4. c. p. 26* Entitled, *The order for accusing Malefactor for crimes*; which agrees likewise with the opinion of the Civilians, and particularly *Clar quest. 20. num. 6.* whose words are, *Scias etiam quod quandoque proceditur contra aliquem tanquam quod prestiterit auxilium delicto, debet prius in processu constare principalem deliquisse. Mars. quest. 26.* gives an example of it just in our case, a Father is pursued as accessory to his Sons guilt, in which case he alledges the Father could not be tried, till the Son was first discusst; & *Alexand. consilii 15. vol. 1. dicit, quod nisi prius constet de mandata i. procedi non potest contra mandantem*; with which the *Engl sh Law* agrees fully, by which the Principal ought to be attainted by verdict, confession, or by outlawry, before any judgement can be given against Accessories, *Bolton cap. 24. num 38.* And therefore, except the Uncle, who was the principal Actor here, were first found guilty by an Assize. my Client as Commander and rathabit can not be punished.

To this it is answered, that the foresaid Law of the Majesty holds only in theft, but not in

other crimes, and that as to all crimes it is abrogat by the 9^o. Act. 11. Parliament, 7^a. 6. by which it is appointed, that all criminal Lybels shall be relevant, bearing art and part, without making any distinction betwixt principal and accessories, and the Father is called here as a principal, having given a warrant, as said is, for else the giving warrant for doing treasonable deeds, or to commit murders, could not be punishable, though nothing followed; whereas in all Law, such deeds are criminal in themselves, and the mandant might be immediatlie punished.

To which it is replied, that this Maxim holds not onlie in theft, but in all other crimes; for as there can be no reason of disparity given to difference theft from other crimes, as to this point; So the rubrick of the former Chap. 4. is general, & in the 4th Verse of that Chapter, it is said generally *That it is manifest, that the commander or receiver shall not be charged to answer, till the principal Defender be first convicted by an assise*, Which is likewise quoad all crimes ordained indefinitely by the 29. Act, Stat. David 2. Nor can it with justice be pretended, that these Laws are abrogated by the foresaid Statute of King James the sixth, for these reasons; 1. That Act doth not expressly bear an abrogation of the former Laws, and standing Laws cannot be abrogat by consequences: nor can it be, but if the Parliament had designed to abrogat so old and fundamental
Laws

Laws and Customs, they would have exprest their design, especially since in criminal cases, all Lawyers endeavour to make their Laws clear and perspicuous. 2. No Laws are interpret to abrogat one another, except they be inconsistent, so infavourable is abrogation of Laws; and it is generally received that *Leges in materia diversa sese non tollunt, nec abrogant*: but so it is that these Laws here founded on, are most consistent with the Act of King James the sixth, and these two are *materia diversa*, for it is very consistent, that a Lybell bearing art and part should be relevant, and yet that the principal should be first discussed; for though the principal be first to be discussed, yet, when the accessories are to be accused, it is sufficient that it be generally libelled against them, that they were art and part, the one of these regulats only the way of procedure, & *ordinem cognitionis*, the other regulats the relevancy, and shows what Lybel shall be sufficient. Nor was there any thing more designed by that Act, *Ja. 6.* but that Lybels in criminal cases should not be cast as irrelevant, as is clear by the narrative of the Act. And by the civil Law, *ordo cognitionis*, & *accusatio eorum qui opem auxilium presterunt*, are alwise accounted different Titles, and are differently treated; so that these two Laws are very different, and very inconsistent. 3. if that Law, *Ja. 6.* had abrogat the former Laws,

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whereby

whereby it is appointed, that the Principal should be discusst before the Accessories, then it had followed by a necessarie consequence, that these Laws could not have taken place after that Act; but so it is, that Defences are daily sustained upon these Laws, as in the case lately of *George Graham*, which shews very convincingly, that they are not abrogated.

The reasons likewise whereupon that Law was founded, ordaining that Accessories should not be pursued before the Principal be discusst, are still in vigor, and are so just and necessarie, that it were unjust to abrogate a Law founded upon them; for the Law considered, that if the Principal were called, he might know many Defences, which if they were known to these who are alledged to be Accessories, would certainlie defend them; as in this case, if the Uncle were called who threw down the house, it may be he would alledge, that he did not throw down this Cottage, till the accuser had consented, which consent he possiblie hath: and this may be necessarie in a thousand cases, as if a person were pursued for having been accessorie to the driving away Sheep, or Neat, he might be convicted, though he were innocent, if the Principal were not called, which Principal if he were called, might produce a Disposition from the party, or a legal Poynding, either of which being produced, would defend both: whereas
upon

upon the other hand, if it were lawful or sufficient to accuse any persons as accessories, without pursuing the Principal, the accuser might collude with the Principal, and suffer him to go unpunished, providing he would keep up the Defences and Warrands, and so suffer the innocent accessories to be condemned.

Is it not a Principle in Nature, that *accessorium debet sequi suum principale*? And doth not the Law still require, that *prius debet constari de corpore delicti*? And how can a man be pursued for hunding out another to throw down a house, until it were first known that the house was thrown down? Nor is the giving an order to throw down a house criminal, though it were proven; except the house were according to that order thrown down, and that it was thrown down by vertue of that order, and upon no other account. By all which it clearly appears, that the throwing down of the house, which is the principal guilt, must be first tried, before it can be enquired, who gave the command.

The last, and one of the great Arguments, I shall use to prove, that the Principal who threw down the house must be first discusst, before my Client can be pannelled for commanding or ratihabiring, is, that by this method, probation should be led against absents, contrair to the known Principles of our Law, & by the connivance or ignorance of

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the

the accessories, the fame of an absent person may be wounded, and witnesses suffered to depone, who dared not have deposed if he had been present ; and though that probation led against him in absence would not be concluding, yet it would leave a stain ; and would engage the deponers to adhere to these prejudicat and false depositions in another Process, to secure themselves against perjury.

Whereas it is pretended, that sometimes command is a crime, though nothing follow, It is answered, that where a mandat is of it self criminal, though nothing follow, as in Treason, there the giver of the Mandate must not be pursued as a Complice, or accessory, but as the principal transgressor ; nor would the King be prejudged (as is alledg'd) if the principal behaved first to be discusst, because it is pretended, that that principal might abstract himself, and thereby cut off the publick revenge, which would otherwise justly fall upon the accessories if they could be apprehended. For to this it is answered, that it is easie for His Majesties Advocat to raise a pursute against the principal, and if he compear to proceed against him, or if he compear not, he may be denounced fugitive, which is a sufficient discussing of him as a principal, and will open sufficiently a way to proceed against the Complices.

It is likewise alledged, that the witnesses

nesses which are offered to be adduced against my Clients, for proving that they committed this crime, are not *testes habiles*, and cannot be admitted, because I offer to prove by their own oath, that they were at the pulling down of the house, and did actually pull it down, and so are *socii criminis*, and consequently are repelled from witnessing, by the 34. *cap. stat. 2. Rob. 1.* where there is an enumeration made of those who cannot be admitted to be witnesses, amongst whom are *socii & participes ejusdem criminis*.

To which exception, the accuser answers, that though *Scius criminis*, cannot be admitted *pro socio*, yet he may be admitted *contra socium*, that he may be witness against, though not for those who were engaged with him. 2. Though *socius criminis* may not be admitted as a witness *contra socium*, where the crime in which they were engaged fixes infamy upon the committers, as Treason, Witchcraft, Murder, &c. yet in Delicts or rather Riots, such as is the casting down of a house, that tends to infer a pecuniary, and not a capital punishment; there *socii criminis* may be received as witnesses; for, the reason why they are ordinarily repell'd, is, because in deponing they confess a crime against themselves, & *se infamant*, which reason ceases in Delicts or lesser crimes, *que non infamant*.

It is likewise represented, that it is most clear from Law, that the only reason why *socii criminis* are repelled from being witnesses is, because *deponendo se infamant*, and so they forfeit the capacity and confidence of integrity that the Law reposes upon all persons that ought to be believed as witnesses, by the whole contract of the whole Titles, ff. C. de testibus. And by *Clar. quest. 21. num. 8. D. Sum socii criminis ad hoc ut fidem faciat, requiritur, ut sit confirmatum in tormentis, cum enim ex proprio delicto sit infamis, nec debet admitti pro teste sine tortura*; and the foresaid Text of the Majesty, ought as is alledged, to be interpret only so, as to take place *ubi crimen infamat*, and that *delicta non infamant* is endeavoured to be prov'd by the Statute of King William, *de his qui notantur infamia* where it is said, that *fures, sacilegii, homicidii*. and others, *qui sunt irretiti capitalibus criminibus, repelluntur a testimonio*.

If witnesses in delicts and riots should not be admitted because they are *socii criminis*, no delict (sayes the pursuer) should ever be prov'd; for ordinarily none are present but the committers. And since after their confession they may be pursued themselves, it is not probable that they will depone against others falsely, especially when they may be overtaken upon their own deposition.

To which it is duply'd, that it is a rule

rule in Law, that *socius criminis, nec pro, nec contra socium admitti potest, l. quoniam C. de test. Mascard. conclus. 1418.* by which it is clear, that the Law makes no distinction whether he be adduced, for, or against his Comrads, whether he be adduced in crimes, or delicts; and *socius criminis* is not only repell'd from being a witness, because he stains his own fame, whilst he depones against his companions, but because the Law presumes that being himself under the mercy of the pursuer, he will by an unjust deposition ransom himself from the event of the pursuit, and therefore the Law casts him as a witness; for the Law is unwilling to use those who hath offended it, and Lawyers have alwise been unwilling to tempt men, by forcing them to depone upon their own errors, for they judged, that these who would commit a crime would easily forswear it. And the Law of the Majesty formerly cited doth repell *à testando socios criminis, & infames*, whereas it needed not to have exprest both, if it had comprehended the one under the other, and only repell'd *socios criminis*, because they were *infames*.

I perceive by Lawyers, that sometimes they allow witnesses in atrocious and great crimes, whom they would not have admitted to prove crimes of less consequence which proceeds both from the hatred they carry to these great crimes a part of whose
punishment

punishment it is that the crime can be easily prov'd, but likewise to the end the Common-wealth may be the better secured; whose great concern it is, that Judges be not too nice and scrupulous in receiving witnesses against its enemies. Nor did the Law think, that men would be so base and malicious, as to seek the death of their enemies by a false deposition, even where possible revenge would be content to reach their Estates. Therefore, by the common Law of Nations in atrocious crimes, such as treason, simonie or sacrilege, *socii & participes criminis admittuntur, l. quisquis C. ad l. ul. majest. glossa in l. fin. C. de accus. specul. tit. de prob. §. 1. Boer. quest. 319.* and according to our Law it is appointed by an express Act of Sederunt, anno 1591. that *socii criminis* may be witnesses in the cases of Treason, and Witchcraft; but I do not at all read, that *socius criminis* is allowed to be led a witness in delicts, and all the reasons that militat for the former cause, do militat against this, Nor is it possible to believe, that the Law which allows *socii criminis* to be the witnesses in great crimes, because they are great, would likewise allow them to be led witnesses in small crimes, because they are small; for so the Law would contradict it self, and would build contrarities upon the same foundation: and since the forsaide Act, 1591. allows them to be led witnesses in crimes of Witchcraft, and Treason, they

they ought not to be admitted in any other crime, how small so ever, for in *privilegiatis, inclusivum, est exclusio alterius*.

It is very clear, that the Law would not admit the testimony of a partaker of the crime, to have the force of a presumption, nor to be the ground of an accusation, *Salicet in l. fin. C. de accus.* nor gives it any credit to his deposition, though he were otherwise esteemed a most credible person *probatissima fidei, Grammat. consil. 21. num. 3.* nor doth it believe him though he were deponing against a person suspected to be guilty, *Berr. consil. 268.* nor doth it believe a thousand such witnesses, though they agreed in their depositions, for all these joyned together weigh not one presumption, *Mascard. ibid. num. 8.* By all which it may appear very clearly, that the Law which respects *socius criminis* so little, doth in no case design to receive them in a criminal Court, what ever may be debated for receiving them in civil Courts, for proving civil conclusions.

As to the inconvenience adduced, wherein it is contended, that if such witnesses were not admitted, no crime could be proved; it is answered, that this Argument would urge Judges to receive *socius criminis* to be witnesses, as well in all crimes, as in small crimes; for it is a *Brocard* commonly received amongst the Doctors, that *quod admititur ob incommodum, eo magis admititur, quo magis urget incommodum*; and

and yet here it is confest, that they could not be admitted witnesses in murder, and those greater crimes. But the only natural conclusion that could be drawn from this inconvenience, is, that *socii criminis* should be admitted witnesses in occult crimes, such as conspiracies, but not in such crimes as this where there could be no penury of witnesses, being alledged to be committed in open day, in the midst of a Town, and with a convocation. But to conclude all, I need only say, that my objection against these witnesses is founded upon an expresse Law, and therefore it cannot be taken away by this distinction, except this distinction can be establisht upon, and maintained by another Law as expresse.

The Justices found, that these Minors being puberes, might be tryed, and so found, that they should passe to the knowledge of an Inquest.

2. They found the Father should passe to the knowledge of an Inquest, as art and part, though the principal actors were not yet discusst.

3. They found, that *socius criminis* could not be receivd a witness in any criminal pursue, though the punishment could only reach to a pecuniary mulct.

AN ANSWER

To some REASONS printed in
England, against the overture of
bringing into that Kingdom, such
Registers as are used in Scotland,

IN the first Ages of the World, when man
had not fallen so intirely as now from
his original innocence, Laws were made
rather to govern reasonable men, than to pre-
vent cheats. But when fraud did begin to
grow up with subtilty, Legislators being
warned to guard against future abuses, by
these they had seen committed, did in all
places endeavour to reform their people, by
reforming their Laws & sic ex malis moribus
bonæ orta sunt leges; and because wise men
look upon themselves as sprung from the
same divine original, therefore they have
still been intent to borrow from one another
what excellent constitutions they found to
have been invented by them. Thus though
Scotland did adopt the Laws of the Rom-
ans (called now the civil Law) into the
first place next their own; yet, such esteem
hath that Kingdom alwayes had for their neigh-
bours of England, that they have incorporated
into

into the body of their own Laws, very many *English* Forms and Statutes. And as some Sciences, Trades and Inventions flourish more, because more cultivated in one Nation than another, humane nature allowing no universal excellency, and God designing thus to gratify every Countrey that he hath created; so *Scotland* hath above all other Nations, by a serious and long experience, obviated most happily all frauds, by their publick Registers. And though they are not further concerned to recommend this invention to their Neighbours, than in so far as common charity leads them, yet finding their Registers so much mistaken in a Discourse, entituled, *Reasons against registering Reformation*. I thought it convenient to represent a short account and vindication of them. Registers are appointed in *Scotland*, either for real Rights (for so we call all Rights and Securities of Land) or for personal Obligations, by which a man binds his Person, but not his Estate. Men sell their Land in *Scotland*, either absolutely, or under Reversion; if absolutely, it must be either to the Sellers own Superior, or to a stranger; If to his Superior of whom he holds his Land, it is transmitted with us by an Instrument of Resignation in the hands of his Superior, *ad perpetuam remanentiam*, where by the Propriety is consolidated with the Superiority, and this Instrument must be registrat. But if he sell it to a stranger, then
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the Acquirer must be seased, and this Sasine must be registrat within sixty days. Or if a man do not absolutely dispoise his Estate, but retain a power to redeem the same, upon payment of the Sum for which it is wodset or morgaged, then the Paper whereby this power is allowed, is called a Reversion, and it must be registrat within sixty days also. If any Heretor be suspected by his Friends to be prodigal, or unfit to mannage his own Affairs, he interdicts himself to his Friends in a Paper, wherein he obliges himself to do no deed without their consent: Or, if a Creditor who lent his money to an Heretor, find that Heretor intends to sell his Estate, without paying him, albeit he did lend his money in contemplation of that Estate, which the Borrower then had; he makes an application to the supreme Judicature of the Kingdom, called, *the Lords of the Session*, and from them obtains a Warrant to inhibit his Debitor to sell that Estate, till he be payed, which Interdiction or Inhibition must be first published at the Mercat-cross where the Lands lye, and then registrated within forty days.

There are two of these Registers, or publick Books, one in the chief Town of the Shire, and another at *Edinburgh*, which serves for all the Shires, and in either of these, all these Sasines, Reversions, Interdictions, and Inhibitions may be registrated: So that when any man intends to buy Lands, he goes

goes to the Keepers of these Registers, who keeps a short breviat of these in a book apart, called the *minute Book*, (bearing the day when any Inhibition was presented against such a man, at the instance of such a man) and there he finds for a Crown, what incumbrances are upon the Estate he intends to buy, and if he find none, he is secure for ever.

As to personal Bonds, they need not be registrated, but if the Creditor resolve to secure his Bond against losing, or if his Debtor refuse to pay his money, when he calls for it, then he gives in the original, or principal Bond to the Register, who keeps it still and gets out an Extract or Copy of it, collationed by my Lord Registers Servants, and subscribed by himself or his Depute ; for there is a Register for Bonds in every Shire, Town, and Jurisdiction, as well as at *Edinburgh*. This Registration hath with us the strength of a judicial Sentence, and warrands the Creditor to charge his Debtor, to pay under the pain of Horning (or outlawry) and if he disobey, the Horning is registrated. And thus every man knows in what condition his Debtor is, as to his personal Estate, if he begin not to keep his credit ; and this Register serves both for execution and information.

This being the state of the Registers in *Scotland*, the usefulness of that institution, may appear from these following reasons,

First

First. There is nothing discourages men more from being vigilant in their employments, than when they apprehend that the money which is that product, by which their pains uses to be rewarded, cannot be secured to their posterity, for whose advantage they disquiet themselves, and toil so much. And thus the Common-wealth will be but lazily served, Trade will be starv'd and ingenuous spirits discouraged. Nor is it to be imagined how purchasers will be, or are induced to be at much pains and expences, to improve their grounds, and adorn their dwellings ; when the looseness of their right lays them open to renewed hazards, nor can they enjoy with pleasure, what they cannot possess with certainty. And what frail securities have such as are forced to rest upon the ingenuity of sellers, who of all people are least to be trusted ? for such as sell Lands, are either prodigals who are too vitious, or distressed persons, who are ordinarily under too many necessities to be believed.

2. Registers are of all others, the greatest security against the forging of false Papers ; for forgers use to conceal for some time, the papers they forge ; Whereas necessity of registering them within such a time, will either fright the contrivers, from doing what they must expose to the light, or will at least furnish such as are concerned to have the fraud detected, with means.

means which may be effectual, ſeing it is much eaſier to expiſcat truth whilſt the witneſſes are alive, and all circumſtances recent, than after that a long interval of elapſed time hath carried away the Perſons, and obſcured the circumſtances, from which truth could have received any light.

3. Purchaſers being fully ſecured by the publick faith of Registers, need not burden the Seller with a neceſſity of finding ſurety to them for the validity of the rights ſold, which as it reſolves ſtill in an perſonal (and conſequently an unfixt) ſecurity, for the buyers, ſo vexes very much the ſeller and his friends.

4. The Security which flows from Registers, cuts off much matter of pleading, and thereby defends againſt thoſe feuds and picques, which laſt ever after amongſt ſuch as are concerned, and keeps Gentlemen at home improving their Eſtates, and Merchants and Tradſmen in their Cantors and Shops, enriching the Nation.

5. When men are to beſtow their Daughters, they are by our Registers informed, and aſſured of the condition of thoſe with whom they deal, and by their means, men are kept from giving their Daughters and their Fortunes, or a conſiderable ſhare thereof, to Bankrupts and Cheats. Likeas, the Daughters are by them, ſecured in their Joyntures, and not expoſed after their Huſbands Death, to tedious ſuits of Law,

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the dependance whereof draws them to publick places, unfit for their Sex, and the event whereof drives them to begging and misery.

6. By these, the price and value of Land is much raised, for by how much more the Purchase is certain, by so much more it is worth.

7. By these, Heretors who are oppressed by Debt, are relieved by the sale of their Lands, upon which Buyers now adventure freely ; whereas, if they were to rely upon the faith of the Sellers, their Estates might continue unfold, till the Rent of their money should eat up the stock.

8. By these, Usury and unfrugal Transactions with Brockers and others, are much restrained ; for if purchases of Lands were not secure, men would rather choose to hazard their money so, than upon Land.

9. By these, Parents know when their Children and Kinsmen, when their Relations debord, and burden their Estates, and are thereby warned to check, or assist them.

10. By these strangers and forreigners are secured who resolved to match with us, or to purchase amongst us, for our Registers are equally faithful to all.

11. By these, Commerce is very much secured ; for, if a Merchant, or ordinary Transacter refuse to pay his Debts, then
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his Bond is put in the publick Register, by which the Creditor is secured of Payment, and the Debtor is deterred from owing too much.

12. By these Registers, Papers are secured against fire, loss and accidents, to which they are exposed whilest they are kept in privat hands: Whereas, after Registration, nothing can destroy them but what ruins the whole Kingdom, and even in that case, there is still hope of recovering publick Registers, as in our last revolutions.

In this last place, I must crave leave to wonder, why *England* hath already taken so much pains to secure against fraudulent cheating of Creditors & of Buyers, as is clear from the Statutes cited by the Author, if they intend not to prosecute that worthy design. But as an evident mark to know whether Registers be necessarie, they may consider, that if any man in *England* can for a Crown, know in the space of a day, the condition of these from whom he purchases, then Registers are not necessarie, but if otherwise, they are; If any Lawyer in *England* can assure his Client, that the purchase he makes is secure above all hazard, then Registers are not necessarie; but if they cannot then Registers are necessarie; so that it seems *England* hath done too much already, or else that they should do more to secure their people. Yet, since I only design to defend our own Law, and not to impugn theirs. it
were

were impertinent for me to recommend too zealously, that wherein I am not much concerned.

Against this so just and so necessarie a constitution, founded so strongly upon reason, and approved so firmly by experience, the Author of the *Reasons against registering Reformation*, hath put his invention and wit (both which I confels are very fertile) upon the rack to find out, and muster up some Arguments, which owe their number and beauty to the unacquaintedness of his Countrey-men with the model he impugns, and which the Author hath beat out by too much industry, to a thinness, that is not able to bear the weight he lays upon them.

His first Argument is founded upon the dangers that arise from Innovations, wherein Legislators are not able to have a full prospect of all inconveniencies which may follow : But to this it may be answered, that the Law of *England* had not deserved the honour done it by the Author, nor had it swelled to its present bulk, if it had not been frequently augmented by new additions. And as to this project of keeping Registers, *England* may be wise upon the hazard of their Neighbours, who by being first practisers, have run all the risque, and taken all the pains which was necessarie, for accomplishing so great a design.

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The second reason bears, that by Registers, the lowness of the fortunes of such who suffered for his Majesty, would be discovered, and they thereby exposed to much rigour from their Creditors: but this I humbly conceive, proves more the contrary opinion, than that for which it is adduced; for as it were unjust to gratifie such as have suffered for His Majesty, with the liberty of preying upon such as probably lent them, because they were of their principles, and of devouring poor Widows and Orphans, whose necessities will doubtless load one day very much, the Consciences of such as might have secured their petty fortunes by the help of the Registers now proposed. And this Argument presses no more against Registers, than it doth against all those laudable and well contrived Statutes, which are already invented in *England* against fraudulent conveyances, forgeries and impostures; for Registers will not debar them from courses which are legal and honest.

Whereas it is in the third place urged, that Commerce would be a great sufferer by Registers, seeing they would lay open the lowness of mens fortunes, who do now enrich the Kingdom, and themselves too, upon meer credit; and that they would discover to Forreigners, the low Estate of *England* at present, and make every privat Estate too well known. It is answered, that all these inferences are drawn from the
 Authors

Authors unacquaintedness with what he im-
pugns, as was formerly observed; for a
man is obliged to registrat a Bond, which
oblige only to pay money; Nor do
men registrat such, except where the
Debitor refuses to pay, and so these Re-
gisters will not weaken Commerce nor
Credit, seing Commerce is not immediatly
concerned in real Estates; and even as to
personal Estates, or money, no man suffers
by Registers, or is concerned in them, but
such as have no respect to their Credit, and
Commerce owes little to such, whereas u-
pon the other hand, the fear of this will be
yet a furdur tye upon men to pay punctual-
ly, without which Commerce will soon be
starved. And by the Registers, Bankrupts
will be soon discovered, whereby honest
men who are the true Nurses of Trade will
be much cherished and secured. And by
this answer it appears clearly, that the riches
of *England*, neither personal nor real can be
made known by the Registers; for only the
Bonds of Bankrupts are to be registrated,
and though all real Rights must, yet the
quota of the real Estate is not exprest in the
Papers to be registrated.

After the Author of that Discourse against
registering Reformation found, that so unan-
swerable advantages arise from Registers, as
that they could not be ballanced by the in-
conveniencies which he laid in the other
scale, he is pleased (which is ordinary for
such as cannot prevail by reason) to re-

fleet upon *Scotland*, as a poor Countrey, and
 against the *Scots* as an unmerciful People, and
 to alledge, that their poverty, and severity
 introduced these Registers, and make them
 necessarie with us, but that they would ne-
 ver agree with the rich, and tender-hearted
English; Which reflections deserve rather
 our pity than our answer. Leaving then
 this womanly way of arguing, as unfit for
 the *Scots*, who study to be Philosophers in
 their writings, as well as in their humours;
 It is humbly conceived, that Registers do
 restrain no mans compassion, for no man
 doth vertuously indulge his Creditor, but
 he who knows the lowness of his condition,
 which he cannot without Registers; Ignor-
 ance is less the mother of vertue, than of
 Devotion. Registers prejudice only such as
 are Cheats, and such deserve little compassi-
 on; Nor are our Laws more severe against
 Debtors who pay not, than the Laws of
England; for both imprison such, and the on-
 ly weak side in our Law is, that it allows
 too much our Judges to suspend the pay-
 ment of Debts, and I never heard the *English*,
 who live amongst us, complain of any o-
 ther defects in our Laws. Our Laws are ex-
 tracted from the Civil Law, and such Doc-
 tors as write the Law of Nations; and stran-
 gers understand our Law sooner than any
 other Law in the World, except their own;
 And our Captions for imprisoning Debtors,
 who refuse to pay, are expressly warranted
 by that Law of the *Romans*; which though it
 was

was the best Law in the World, and is universally acknowledged to be such, yet was more severe than ours. The comparing of Nations as to their povertie and riches, brings more heat than light; Nor can any difference betwixt the Nations in these, make any difference as to this design; or if it doth, it may be debated with reason, that Registers are fitter for a rich, than a poor Nation; for where there are most Buyers, and most Land to be bought, Registers are there most necessarie, seeing they were invented to inform buyers, as to the incumbrances wherein Estates are involved by the multiplicitie of Purchasers. Where there is but little Land, and where the Creditor is poor, there the Creditor may have time and leisure sufficient, to watch the small Estate of his Debitor. Our Nation supplies their Neighbours with Corns and Cattel, Lead, Copper, Timber, Coal, Salt, and manie other necessaries; whereas in exchange of these, it receives onlie from them Wine, Spices, Silks, and other superfluities which as *England*, no more than *Scotland*, have growing within their Countreys; so it probable that both Nations would live more happilie without them: and thus it appears, that *Scotland* is not so poor, as these reasons are.

I would here put an end to these observations, if I were not unwilling to suffer that Gentleman to continue in his error of think-

ing, that our registration of Movable Bonds owes its origin to the *Coursini*, the Popes brokers in *England*, and to the *Camera Apostolica*, under the reign of *Henry the third*; for as it is most improbable, that our Nation would borrow so fundamental a Constitution, from what was practis'd in a Nation that was in enmity with them at that time; so it is no way probable, they would have followed the methods of the Popes Agents at that time when they were oppress'd by their Master the Popes endeavouring to subject their Clergy of *Scotland*, to the See of *York*. and by these Agents themselves, in such merciless Exactions.

But the truth is, that though the compleating of this excellent Constitution, is an honour due to *Scotland*; Yet, its first origine is rooted in the Roman Law; and most Nations of the World do at this day use Registers, which may be thus cleared. The Romans, to restrain excessive Donations appointed them *insinuari apud Judicem ut obviaretur fraudibus*, which Insinuation was the same with our Registrations; thereafter they used *Regesta, quæ vulgo registra, quasi registaria dicuntur, illæ erant acta tabulæ publicæ*, which were at *Constantinople*; and in the Eastern Empire, called *βιβλίουματα*, as *Præf.* observes: and by *Vopiscus in Probo*, are called *Registra. Ufus est enim (inquit Vopiscus) registris, scriptionum porticus propheta*.

The

The Romans had likewise publick Books, wherein papers were preserved, which were under the Western Empire called *Archivum tabularia & tablinum*, but under the Eastern Empire were called *Grammatophilacia*, *ubi instrumenta publicæ deponuntur*, as Ulpianus observes, *L. Moris. ff. de pænis, §. 6.*

That other Nations besides Scotland use to preserve their papers in publick places, and appoint their privat Rights to be made publick and known by registering them, appears from *Alex. consil. 16.* wherein he treats of the Registers *Civitatis Rhæg.* And by his *consil. 23.* wherein he treats of the Registers *Civitatis Arimini*; and at Rome they use *Registrum supplicationem apostolicarum*; And another Register *Literarum Apostolicarum, Cassr. consil. 345.* But the Registers used by us, have been allowed, and imitated by the French most exactly: for a Constitution, *anno, 1553.* made by *Hen. 2.* provides, that all Dispositions, Contracts and Obligations exceeding fifty Livres, shall be registrat; and if it be not registrat, it shall be null, in so far as concerns third parties; the narrative of which Law, proves the advantagefulness of Registers; for it bears, that after all other means have been essayed, we find that there was none save this of Registers to make our Subjects live in assurance, to obviate all Debates, and to prevent Cheats. In which, and these other Constitutions which follow upon it, all the methods used by us are exactly set down, such

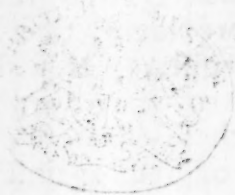
as the marking of Registers in every leaf, the having particular Registers in every inferior Jurisdiction, and the marking of the principal, or original Papers upon the back; there also the Copies collationed are called *Extracts*. But that in this they imitated us, is clear, for we had Registers before the year, 1449. because by the twenty seventh Act, fifth Parl. *Ja* 3. Reversions are appointed to be registrated; which Act speaks of Registers as then in being, and fully established.

I find also, that in the old Hansiatick Maritime Laws, *tit. 11. art. 4.* it is provided, that *nullus nautarum, ullam filliginem, aut alia bona navi importet, vel exportet, sine scitu naucleri, & scriba navalis ubi etiam in registro poni debent.* Which I observe to clear, that all Ages and Nations, Traffiquers by sea, as well as Lawyers by land, have thought Registers advantageous for commerce, and a sure fence against Cheats, and if Registers be necessary in such mean and transitory occasions as Loadings and Moveables, much more are they necessary in Lands, which as they are of the greatest importance, so are of the longest duration.

Since then Registers have been found so advantageous, and that experience hath herein seconded reason, it is humbly conceived that *Scotland* is much to be magnified for their Registers; And that *England* may, without disparagement, introduce this new amongst their

their old Statutes whereby they cannot be so properly said to innovat, as to enrich and augment their own Law, *Nec pudet ad meliora transire.* But I know that Nation to be so wise and provident, that if they understood our Registers, as well as they do their own concern, they would easily prefer them to those Reasons, which this Gentleman has offered against them.

F I N I S.



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